Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THOMAS A. MASS, pro se and JANET A. MASS,
Petitioners,

v.

CITY OF CARLSBAD, a Municipal Corporation; FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP, a California Limited Partnership,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division One

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a state statute be so interpreted and applied by the state courts below so as :

A. to fail to provide for a pre-deprivation process, knowing that property owners may by an adverse decision, of the adjudicatory proceeding, be deprived of a substantial and significant protected property right; and

B. to provide for an immunity for "conditions or requirements" imposed on private property in the process of land regulations proceeding on the basis that if peripheral property owners' property is "taken," they have no remedy because the "taking" would be a private taking and not a public taking; and

C. not to provide for actual notice to affected persons of the existence of a truncated statute of limitations; and

D. to permit the land developer to provide the governmental agency an indemnification from liability, including malfeasance and inverse condemnation, in consideration of approval of their subdivision; and

E. to permit a private entity, not in privity with a public agency, to have a derivative right to be immune from liability for nuisances cause by them, where the public agency does not nor did they claim such an immunity, where the nuisances also affect a public taking of private property; and not be repugnant to the U.S. Constitution and law and thus unconstitutional on its face and as applied to petitioners as a deprivation of their personal and property rights?

QUESTIONS PRESENTED

2. Can a person or persons under color of state law, violate individuals' Constitutional or other federal rights, and then by state administrative and judicial proceeding and unconstitutional laws deny them a remedy for these rights by employing any one or more of the following described conduct?

A. Deny them a constitutionally sanctioned adjudicative administrative hearing by basing them on state statutes and procedures that are repugnant and unconstitutional on their face and as interpreted and applied.

B. Deny them a pre- and post-deprivation remedy for inverse condemnation by erroneously striking and dismissing their complaint that states a good cause of action.

C. Deny them a remedy against a private entity based on negligent, wanton, willful and conspiratorial acts and omissions based on a statute that has been interpreted and applied to provide a derivational right to a governmental immunity from liability for acts and omissions causing a nuisance.

D. Deny them a remedy by erroneously interpreting and applying an unconstitutional, inapplicable, and otherwise barred statute of limitations.

E. Deny them a remedy to redress the deprivation of a right to a jury and their other constitutional, personal and property rights under the federal Civil Rights Act of 1871 (42 U.S.C. §1983).

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3. Can a state court by a pattern of misperceptions of facts, flawed logic and erroneous interpretations and application of the law, use state law, both substantive and procedural to frustrate a U.S. citizen from obtaining their constitutional rights and remedies?

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ABBREVIATION KEY

In making references to the record to support the raising of the federal question in a timely and proper manner, petitioners will use the following abbreviations:

AOB	Appellants' Opening Brief
ARB	Appellants' Reply Brief
APR	Appellants' Petition for Rehearing
SPR	Supplemental Petition for Rehearing
PFR	Petition for Review
RTA-PFR	Reply to Answer to Petition for Review
JA	Joint Appendix in the Trial Court

APP	Parts A-E attached to Petition for Writ of Certiorari
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Thomas A, Mass and Janet A. Mass respectfully petition for a writ of certiorari to review the judgment of the California Court of Appeal, Fourth Appellate District, Division One in this case.

OPINIONS BELOW

The opinion of the court of appeal (APP, infra , 21-35) is not to be published in the official reports.

JURISDICTION

The court of appeal entered its judgment on June 17, 1994 (APP, *infra*, 21-35). The court of appeal denied a timely petition for rehearing on July 6, 1994 (APP, *infra*, 36). On September 7, 1994, the Supreme Court of California denied a petition for review (APP, *infra*, 37). The court of appeal entered an order on September 26, 1994 finding that the opinion and judgment of June 17, 1994 is now final (APP, *infra*, 38).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL, STATUTORY AND ORDINANCES, PROVISIONS INVOLVED

United States Constitution Amendments Five, Seven and Fourteen.

Federal Statutes: 42 U.S.C. § 1983; 42 U.S.C. § 1985; 42 U.S.C. § 1986; 42 U.S.C. § 1988 .

California Civil Code § 3482.

California Code of Civil Procedure § 338, §1094.5(b) and §1094.6.

California Government Code: §65091, §65351, §66451.4, §66458, §66473, §66473.5, §66474, §66474.1, §66474.9, and §66499.37

California Vehicle Code §21.

Carlsbad Municipal Code §1.16.010.

Carlsbad Subdivision Ordinance: §20.20.010, §20.20.020, §20.20.040, §21.54.060, §21.54.064, and §21.54.120.

Because of the lengthy and voluminous nature of the text of these citations, they have been set forth verbatim in Appendix Volume II, Part One.

STATEMENT OF THE CASE

The petitioners, husband and wife, are owners of a residence that is contiguous to a proposed subdivision that is under construction. When completed, it will consist of 132 free standing residences. It is separated only by a short, little-used local street, that ends in a cul-de-sac, named Corté de la Vista. The petitioners had no objection to the proposed subdivision.

On or about the seventh day of December, 1990, the petitioners received a "Notice of Public Hearing" by "The City," that "The Developer's" application for approval of its tentative map would be considered. Petitioners had learned that as a condition or requirement for approval of "The Developer's" tentative map, it would be necessary for them to relocate the single access gate off of Alicante Road and onto Corté de la Vista. "The City's" Circulation Element classifies said Alicante Road as a secondary, arterial street. It has a turn lane in its median and is designed to accommodate between 5,000 to 20,000 average daily trips. The same Circulation Element limits the average daily trips on Corté de la Vista to no more than 500. "The City" Traffic Ordinance estimates that this subdivision will generate 1,320 "trips" each weekday. This is close to three times the maximum by itself.

Because of the adverse environmental impact caused by this traffic diversion, petitioners attended said public hearing and were permitted a few minutes to voice their general objection based on health, safety and property value considerations. This adjudicatory administrative proceeding was pursuant to Government Code §§66410-66499.37, known as the Subdivision Map Act ("SMA"). It forms a part of California's land planning and zoning laws, Government Code §65000 et seq.

"The City" on January 8, 1991 approved the tentative map, including its traffic regulation without notice of any kind. It also approved the final map on September 3, 1991 without notice or hearing and without any other notice.

As a result of "The City's" conduct based on state law and their own ordinances, petitioners were deprived of their federal

constitutional and statutory rights and interest as set forth in their complaints. A traffic servitude was taken without "just compensation," and in the process, they were deprived of their civil rights, interest, privileges and immunity as specially set up and claimed in their complaints.

How The Federal Questions Were Presented

The federal questions presented fall into distinct categories that are separate but related. The first group of federal questions are based on the fact that the ". . . validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution . . . or laws of the United States, ..." The second broad group is rooted in the deprivation of rights, interest, privilege, or immunity which were specially set up and claimed by the petitioners in the courts below which are based on the United States Constitution and laws.

A. Under the first group, the "SMA" as it has been interrupted and applied by the court below is repugnant to the United States Constitution and laws. It is recognized that land use decisions which substantially effect the property rights of owners of adjacent parcels may constitute "deprivations' of property interest within the context of procedural due process. It has also been held that the approval of a tentative subdivision map by a governmental agency is an "adjudicatory function, and as such, those persons so affected are constitutionally entitled to a meaningful notice and a fair opportunity to be heard before such a deprivation.

That in recognition of this need to provide peripheral property owners with a constitutionally sanctioned pre-deprivation process, the California State Legislature in 1980 added §66451.4 to the "SMA." Said section provided for "Notice of Application to owners within 300 feet." In 1984, the said legislature repealed said §66451.4. Thus, the "SMA" has no provisions for a constitutionally sanctioned pre-deprivation process. As such, it denied the petitioners of their property

rights and interest without due process of law and without "just compensation."

The lack of a meaningful notice and a fair hearing in connection with petitioners' right to a pre-deprivation proceeding is set forth in the "Third Amended Complaint" in Appendix Volume I, pages 36-64, and more specifically, without limiting the generality of the foregoing paragraphs 16, 20, 28, 32, 33, 56, 68, 69, 70, 72 and 76. The passage of the section proving for a pre-deprivation notice to the peripheral property owners and its subsequent repeal was also raised by petitioners in their petition for rehearing before the Court of Appeal (APP I, 134-136).

B. On page 8 of the opinion of the court below, held:

> Accordingly, we conclude conditions or requirements imposed by governmental agencies for approval of subdivision maps for the development of private property do not constitute "public" uses or purposes which would subject those agencies to inverse condemnation liability.

Thus, the court below interpreted and applied the "SMA" in such a way that the "traffic servitude effected by "The City" and imposed on petitioners' property, would not constitute a public taking and therefore "The City" would be immune from inverse condemnation liability.

Petitioners in their complaint for inverse condemnation alleged a good cause of action. They recited facts to support their allegation of a public taking. (APP I, 1-9). They also raised these issues in all their P's and A's and briefs. The court below acknowledges this in their opinion starting at page 5 prior to their holding.

This again, deprived the petitioners of their property rights and interest without due process and without "just compensation."

C. In addition, the "SMA" contains a truncated statute of limitations, which bars claims, and is not self-executing. Said section 66499.37 of the *Government Code* does not require that parties affected be given notice of the decision and/or actual notice of truncated statute of limitations. In the court's below opinion, it dismissed petitioners' objection in a footnote on page 18:

> Fn.6 Based on our discussions above, we need not address the Masses' meritless contention that a short statute of limitations requires notice to them in order to be constitutional under the mandamus provisions of Code of Civil Procedure section 1094.6.

Accordingly, said §66499.37 is a deprivation of petitioners' property rights and interests without due process of law and without "just compensation."

The documentation to show that this federal question was timely and properly raised can be found in APP II, 76-90 and 123-124, as well as in petitioners' complaints. In light of the decision of this Court in *Tulsa Professional Collection Services, Inc. v. Pope, Executrix* (1988) 485 U.S. 478, there should be no argument on this issue whatsoever.

D. Said "SMA" also contains in §66474.9 a provision wherein a developer can indemnify "The City" for its approval of the developer's subdivision. The section does not limit its use, and thus includes malfeasance as well as misfeasance and also permits "The City" to indemnify itself from inverse condemnation liability.

This statute permits "The City" to indemnify itself from acts in excess of its jurisdiction, acts of malfeasance and inverse condemnation liability. It's in contravention of a strong public policy and is repugnant to the Constitution and laws of the United States. It is unconstitutional on its face and as applied to petitioners. The courts below have ignored their objections, thereby depriving them of their Constitutional rights of just

compensation, due process, equal protection and privileges and immunities.

Early on in the pleading stage of these proceedings, petitioners alleged, recognition of a potential of the existence of an indemnification agreement between the respondents. This problem was put aside based on the fine reputations of the law firm that represented both respondents. It was not raised until the filing of Appellants' Petition for Rehearing (APP II at 38-40). There is no mention of this issue in the lower court's opinion.

E. In addition to the "SMA" being repugnant to the United States Constitution and its laws, so is section 3482 of the *California Civil Code*. Said section provides: "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

By all cases and commentaries, this statute, when applicable, has been limited to governmental agencies and others in privity with them. "The Developer" in this case was not a governmental agency nor in privity with "The City." On page 10 of the court's below opinion, it held as follows: "To the contrary, we conclude section 3482 may apply in appropriate circumstances to non-governmental entities or persons."

On the same page, the court went on to hold that "The City's" authority under the "SMA" to impose "conditions and requirements" (e.g. a traffic servitude) "for public safety purposes" by requiring the relocation of the access gate was a reasonable condition. It then held:

> As such, not only is the City exempt from nuisance liability under section 3482, but Fieldstone is also exempt from nuisance liability to the extent the nuisance allegations relate to and arise out of relocation of the access gate.

A governmental immunity provided for by the legislature and approved by the court below, is still a void defense against a claim for "just compensation" under the constitution. The

statute, as interpreted and applied by the court below, permits a private entity to derivatively invoke a defense that the public entity itself is prohibited from using. A taking by a "nuisance" does not make it any the less a taking under the constitution.

The statute's repugnance to the Constitution has deprived the petitioners of their personal and property rights guaranteed to them therein.

Since the respondents filed their first demurrer to petitioners' claim against "The Developer" the issue of the government immunity relating to a nuisance has been in all the pleadings, P's and A's and briefs. The court below has dealt with that issue on pages 8 and 9 of its opinion. It held in substance that not only is "The City" exempt from nuisance liability, but also "The Developer" "to the extent the nuisance allegations relate to and arise out of the relocation of the gate." In petitioners' Petition for Review, they summarized their reasons why the court of appeal's decision was erroneous and unconstitutional, if so interpreted and applied.

The second broad group of federal questions involved in this case are based on the deprivation of petitioners' rights, interest, privilege and immunities, under the United States Constitution and law. They have been specially set up and claimed in petitioners' complaints, P's and A's in opposition to respondents' demurrers and their briefs in the courts below. These constitutional deprivations, in one part, grow out of the conduct of the respondents in connection with the "adjudicatory administrative process between them, under the "SMA," before, during and after the decision therein.

The other part of these deprivations grow out of the judicial proceeding following the decision by "The City" in its adjudicatory administrative proceeding.

A. Conduct Of Respondents Regarding The Adjudicatory Administrative Process

The conduct of the respondents that deprived the petitioners of their Constitutional civil and property rights may be categorized as follows:

(1) The notice, hearing and decision relating to the approval of the "tentative subdivision map"';

(2) The decision approving the final subdivision map.

B. The Conduct Of The Judicial Proceedings

The judicial proceeding also resulted in the deprivations of petitioners' civil and property rights in the following particulars:

(1) holding that petitioners' cause of action against "The City," for inverse condemnation does not state a good claim;

(2) holding that petitioner did not state a good cause of action based on (the "Developer") negligent, willful and conspiratorial acts and omissions was barred by Civil Code §3482;

(3) holding that petitioner did not state a good cause of action for the deprivations of their federal and state civil rights; and also, based upon such deprivation holding that the writ of mandate cause of action failed to state a good claim against "The City";

(4) holding that petitioners did not state a good cause against "The City" based upon the deprivation of their civil rights under §1983 et seq.;

(5) holding that petitioners did not state a good cause against "The Developer" based upon the deprivation of their civil rights under §1983 et seq.;

(6) holding that amended Supplemental Complaint was late and did not state a cause of action.

Other than the two causes of action in Count II against the developer, and two of the three causes of action in Count III against "The City," the balance of the other causes of action not only involve a federal question but are based on the deprivation of petitioners' rights and interests under the U.S. Constitution and laws. "The Developer" raised only one defense to Count II, and that was based on California's Civil Code §3482. They claim a derivative right to governmental immunity for liability as to the nuisance they created. Thus, "The Developer" defense is based on the same statute that petitioners have hereinabove

claimed to be unconstitutional under the U.S. Constitution and its laws.

Accordingly, these causes of action now also present federal questions. The two other causes of action, not directly involving federal questions, met the same fate, but for different reasons. Count III is bottomed on petitioners' deprivation of their rights and interests under the U.S. Constitution and laws. It seeks the remedies provided for under the federal civil rights act, 42 U.S.C. §1983. Petitioners also allege a cause of action for the deprivation of their civil rights under California's civil rights law, based on the identical facts as alleged in their §1983 claim.

The third and final cause of action in Count III is a request for a writ of mandate and this cause of action is also based on essentially the same facts that petitioners alleged in their §1983 cause of action. Thus, all causes of action in petitioners' complaints, even the few that did not originally and by themselves involve federal questions, now also, involve substantial and significant federal questions. This concludes the statement of facts of the case as it relates to the consideration of the federal questions presented, in connection with the State statutes that are repugnant to the U.S. Constitution and its laws. It focuses on those statutes and how they were involved in the adjudicatory administrative proceedings.

The facts relating to the consideration of the federal question presented in connection with the deprivation of petitioners' rights and interest under the U.S. Constitution and its laws do not lend themselves to a brief and concise statement. Not only are the facts disputed but the parties perception of them are diametrically opposed. Even as to the law, they were like two ships passing in the night. They not only disagree as to what specific cases hold, but base their respective claims and defenses on wholly different bodies of law. The only way the court could resolve these critical factual and legal issues, short of a complete review of the record, is by employing the use of appendices.

The Rules of this Court provide a remedy for this situation. Rule 14.1(b) permits the text of Constitutional provisions, statutes and ordinances to be set forth in an appendix, if the

provisions involved are lengthy. Rule 14.1(k) also permits the incorporation of portions of the record where review of a judgment of a state court is sought. In such cases, the statement of facts must establish that the federal questions sought to be reviewed were timely and properly raised in the court below.

In order to properly comply with these requirements by appropriate quotations, and summaries of the record, petitioners have set forth in Appendix II ("APP II") the text of the Constitution, statutes and ordinances involved in this case, as well as the docket entries to the courts below. Petitioners have also included in said appendix, lengthy quotations in support of the jurisdictional aspects of the federal questions involved.

Regretfully, petitioners appendices contain voluminous material. It was deemed necessary in order to establish jurisdiction, as well as to show the many federal questions that were timely presented and properly raised. Petitioners disclaim any attempt to use this material in connection with the merits of the case. At this point, there is no such need nor any such intention. The fact that some of the same material has been used and may be used in the future to support the merits of the case, is purely coincidental.

As indicated, the parties' perception of the facts are radically in opposition. To meet this problem, petitioners have set forth in APP I the complaints that are involved. They will provide a convenient source of the facts, unadulterated by the parties' subjectivism. In determining the constitutional issues involved herein, the facts as alleged in said complaints are not only desirable, but necessary. The two separate appendices will provide this Court with reliable and convenient sources of the facts necessary to determine the federal questions involved in this case. The necessary documents to support this Court's jurisdiction have also been provided and included in the appendix part of the Petition For a Writ of Certiorari as Exhibits A-E.

The adjudicatory administrative process in connection with the approval of the "tentative subdivision map" deprived the petitioners of their constitutional rights. They were neither applicants or parties nor were they in privity with the parties.

They were denied their "due Process" rights because they did not have a constitutionally sanctioned pre-deprivation proceeding. The traffic regulations added by "The City" were beyond their jurisdiction and void. They were also in conflict with "The City's" General Plan and Circulation Elements and again void for that reason. The truncated statute of limitations imposed against them was also void. The traffic servitude "The City" imposed on petitioners' property was taken without "just compensation" and this without "The City" having jurisdiction over the petitioners in the fundamental sense or over their property. These substantial and significant federal questions were raised in a timely and proper manner. Their complaints are part of the trial court record and can be found in the parties' Joint Appendix, lodged with the court of appeal 2(JA 393-437) and 3(JA 542-576) as well as in APP I, 36-64 and 65-92, respectively.

In addition to raising these federal questions early and often in the pleadings, petitioners have covered them in their P's and A's and their briefs (AOB 28-38; ARB 24-36; APR 23-27; and PFR 19-21) also in (APP II 122-125; and 129-132). The court below, in its opinion (attached hereto as Exhibit A) covers this issue in concluding that petitioners' due process rights were not violated in the tentative map approval process.

The respondents admit that they did not provide the petitioners with any kind of notice or hearing in connection with the final approval of the subdivision map. They claim that none was necessary because these proceedings were not adjudicatory administrative proceedings. They base their conclusion that those proceedings required no discretion and that it was mandatory that they approve the map.

However, the "SMA" requirements are explicit that the final map shall not be approved if it is in conflict with the general requirement of the act and "The City's" ordinances. In particular, §§66458, 66473, 66473.5 and 66474 of said act. As a matter of fact, in the use of their discretion, these provisions provide that the governmental agency shall deny approval of the said map if it is conflict with any of those requirements.

Petitioners' complaints allege facts that show that these very requirements were not met.

The respondents, as well as the courts below, erroneously believe that all these requirements have been "overruled" by an ambiguous and inapplicable section of the act (§66474.1).

These issues were raised in petitioners' complaints along with their allegations relating to the approval of the temporary map in the immediate preceding section and will not be repeated. The same is true of the reference to the briefs, except (APR 27-31; PFR 21-22) and (APP II, 125-128; 132-133) should be added to supplement them.

This documents that these federal questions were timely and properly raised, and the treatment accorded them by the courts below in its opinion.

The balance of this statement examining the facts material to consider the federal questions presented, will be done by referring to the record, and the quotations from it contained in petitioners' appendices. Because this group of federal questions grew out of the judicial proceeding by the courts below in sustaining the respondents' demurrers to petitioners' complaints, it will be necessary to examine why the courts found that the complaints failed to state good causes of action and how this resulted in presenting these federal questions.

Petitioners' inverse condemnation complaint states a good cause of action based on any standard of judicial review (APP I 1-9). In support of the federal questions presented by the court's below rulings, reference is made to (APP II 40-55; 56-65; 65-72; 72-74; 75). *Dolan v. City of Tigard*, 512 U.S. ___, 129 L.Ed 2d 304, 114 S.Ct. ____.

Of all specious, spurious, and putative defenses that the respondents have employed, none has been more offensive and odiferous than that of their red herring statute of limitations defense. That is a strong statement but petitioners' opinion, upon examination of the record, confirms it.

The respondents' defense of the statute of limitations has raised federal questions which have been timely and properly raised in the courts below and presented to this Court for its

consideration.* These issues were raised in petitioners' complaints (APP I). They were also presented to the reviewing courts below (APP II, AOB 76-83; ARB 83-87; APR 88-90; PFR 90-91; APR 122-128; PFR 129-133).

On page 5 of the lower court's opinion, it quoted with its approval, the trial court's ruling holding that petitioners' challenge to the subdivision maps were barred by §66499.37 of the "SMA". Again on page 13 of its opinion, the court held in part:

> To the extent that the Masses seek to nullify the tentative map approval, that claim is barred by that part of the provisions of Government Code section 66499.37. . . .

Petitioners' causes of actions against "The Developers" in Count II did not in and of itself raise a federal question. The respondent only raised one issue in its demurrer, and that was that they are not liable for their conduct because of §3482 of the California Civil Code: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." The petitioners in the prior section of this petition state that said statute is repugnant and unconstitutional and therein set forth the reasons. Accordingly, the respondents have raised the federal question.

As noted above, the lower court on pages 9 and 10 of its opinion held, "as such, not only is the city exempt from the nuisance liability under section 3482, but Fieldstone is also exempt from nuisance liability to the extent the nuisance allegations relate to and arise out of relocation of the access gate." Thus, the federal question was properly raised and ruled on.

Count III of petitioners' complaint states a good cause of action for the deprivation of their federal and state civil rights as well as a request for a writ of mandate, based upon said

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* Jacobs et al. v. United States of America (1933) 290 U.S. 13-18; Dickinson v. United States of America (1947) 331 U.S. 745-751.

deprivations (APP I, 36-64). The federal questions were presented to the lower courts in their P's and A's and briefs (APP II: AOB 92-93; ARB 94-111; PFR 99-102, 112-113; RTA-PFR 114-121).

The lower court in its opinion on pages 12-17 acknowledges petitioners' claims (except for the civil rights claim based on California law) and went on to hold that the trial court did not err in sustaining the respondents' demurrer. The federal questions involved in the issues thus raised were also presented to the lower courts in petitioners' P's and A's as well as in he following briefs: (APP II: APR 134-137; PFR 138-145; APR 148-150). Because both the "SMA" and the immunity from liability, based on creating a nuisance (¶3482 of the Civil Code) were major factors in petitioners' civil rights action, they must again be reconsidered in this context. In doing so, petitioners respectfully request that the court reexamine sections A to E of this petition, starting on page 4 of this petition.

Counts IV and V in petitioners Amended and Supplemental Complaints are exclusively based on 42 U.S.C. §§1983, 1985, 1986 and 1988 and include events that occurred subsequent to the filing of the original complaint (APP I, 65-92). The trial court on its own motion "strikes plaintiffs' amended and supplemental pleading on the grounds that it was filed without leave of court" 3(JA 524). Immediately thereafter, petitioners filed their motion to set aside this order and request leave to file said complaint and lodged a copy with the court 3(JA 532).

Thereafter, the court denied said motion 3(JA 646-647). In the reviewing court's opinion, it approved the trial court's order which stated in part on page 13 as follows:

> It appears that plaintiffs are attempting to restate their causes of action under a new theory of federal [civil] rights violations. Plaintiffs have failed to set forth an intelligible pleading. It is impossible for the court to determine whether plaintiffs have stated sufficient facts to maintain a cause of action under 42 U.S.C. §§1[9]83, 1985, 1986 and 1988.

These federal questions were again brought to the reviewing court's attention in their opening briefs (APP II, 146-147).

The lower court concluded its opinion as follows:

> We similarly conclude the court did not abuse its discretion in striking the amended and supplemental complaint. The amended and supplemental complaint did not allege anything substantively different from the three previously filed amended complaints. Accordingly, in light of its redundancy and late filing without leave of the court, the court did not abuse its discretion in striking this complaint." (citations omitted)

In considering the issue in the two causes of action in the Amended and Supplemental Complaint, the lower courts totally failed to recognize that state immunity laws cannot override the liability created by the Constitution.

This concludes the documentation, that federal questions were raised and ruled on by the courts below and that it was done in a timely and proper manner.

REASONS FOR GRANTING THE PETITION

Of all the federal questions presented in this case the group that is the most substantial and significant, ironically, grows out of the application of both substantive and procedural state law. In both the administrative and judicial proceeding in this case, state laws were used to frustrate federal rights. It is so pervasive and perverse that only by reviewing the full record can its seriousness be fully appreciated.

The lower courts in this case, owing to gross mistakes of the law and misreading of the facts committed prejudicial error in the selection and/or application of the standard of judicial review

of adjudicative administrative proceedings. Code of Civil procedure section 1094.5(b) provides in part:

> The inquiry in such cases shall extend to the question whether the respondent has proceeded without or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if respondent has not proceeded in the manner required by law. . . .

The record shows no evidence to indicate that the trial court and the court of appeal made any independent judicial review of the administrative proceedings that they were to examine with strict scrutiny.

"The City" did not have, nor did they acquire, jurisdiction over petitioners or their property in the "SMA" proceedings. The notice and the "hearing" do not come close to meeting due process requirements. All of petitioners' complaints so allege and respondents' own documents that are attached as Exhibits C, D and E support the allegations (APP I, 61-64). The legal authority for these statements is set forth in detail in (RTA-PFR 4-10).

The lower courts in this case also, due to a mistake of law and misreading of the facts committed prejudicial error in reviewing the general demurrer. The general rule is that state law controls in matters of practice and procedure; however, a "federal right cannot be defeated by the form of the local practice." Whereas in this case, a federal cause of action is based on the claim of deprivation of constitutional rights under color of state law, the state court is required to apply federal law (APP I, 36-64; 65-92) and (RTA-PFR 11-12).

Because of the erroneous nature of decisions below, this case provides an excellent opportunity for this Court to exercise its power and supervision over the state courts. It is manifest from the record that the lower courts have made a radical departure from the accepted and usual course of judicial proceeding.

Indeed, the lower court's decision is very wrong and is badly in need of being corrected.

This case is about the abusive arrogance and avarice of power; the raw, naked power of government and land developers. It's about the clash between homeowners' constitutional rights and the self-interest of politicians and the developers of large subdivisions. A cabal of developers in conspiracy with the City, crushed and punished its own citizens with contumely, for the audacity to challenge the conduct of the government.

Together, they took away a valuable interest in our home. Far more importantly, they befouled the air with a stench of corruption. They, with complicity and abuse, took away the justifiable respect that millions of our ordinary citizens have had in the democratic republic form of constitutional government.

This case involved the important property and civil rights of peripheral owners of property affected by proposed subdivisions. In addition, to all such similarly situated persons, in our rapidly growing state, it will also provide protection to a great number of such property owners in other states, which have similar land regulation and zoning laws. It is truly a national problem of the most profound proportions.

The central objective of Title 42 U.S.C. §1983 is "deterrence and compensation," i.e., the protection of an individual's federally secured interests against a specific class of defendants—local government bodies and their officials. The rewarding of "private attorney generals" is a salutory method of "privatizing" the government.

This Court ought to prevent the lower courts herein from permitting California law, in this vital field, from sliding back to its pre-1987 holdings. The executive and legislative branch of our state government, as well as its judicial system are bound by limitations imposed on them by the U.S. Constitution.

This case presents a rare opportunity for this Court to address the federal questions presented, based on non-contested facts, to bring much-needed certainty and uniformity to this area. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted
THOMAS A. MASS
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Petitioner and Counsel for
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November 30, 1994

APPENDIX ATTACHED TO THE

PETITION FOR WRIT OF CERTIORARI

Exhibit		Page
A.	Opinion By Court of Appeal	21
B.	Order Denying Rehearing (7-6-94)	36
C.	Appellants Petition for Review Denied By The California Supreme Court (9-7-94)	37
D.	Order of Remittur by Court of Appeal (9-26-94)	38
E.	Order Following Remittitur by Trial Court (11-8-94)	39

[1] (indicates the page in the Court of Appeal's opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
COURT OF APPEAL, FOURTH APPELLATE DISTRICT,
DIVISION ONE
STATE OF CALIFORNIA

THOMAS A. MASS and JANET A. MASS,
Plaintiffs and Appellants,
v.
CITY OF CARLSBAD, et al.,
Defendants and Respondents.

Court of Appeal No. DO18305
(Super. Ct. No. N53303)

APPEAL from a judgment of the Superior Court of San Diego County, Thomas R. Murphy, Judge. Affirmed in part; reversed in part and remanded.

Thomas and Janet Mass appeal a judgment dismissing their action against the City of Carlsbad (City) and Fieldstone/La Costa Associates Limited Partnership, a California limited partnership (Fieldstone), following the court's grant of the City's and Fieldstone's demurrers without leave to amend their complaint. Their complaint alleges inverse condemnation, nuisance, and violations of constitutional and civil rights, arising out of the relocation of the access street for approval by the City of the tentative map for Fieldstone's subdivision. The Masses contend the court erred in sustaining [2] the demurrer to their inverse condemnation claim against the City based on an inapplicable statute of limitations and an erroneous conclusion there was no "public taking" of their property. They also contend the court erred in sustaining the demurrer to their nuisance claim against Fieldstone based on an inapplicable statute protecting only governmental Agencies. They further contend the court erred in sustaining the demurrer to their

EXHIBIT A

violation of due process and civil rights claim by applying the wrong law. Finally, they contend the court abused its discretion in denying them leave to amend their complaint. For the following reasons, we affirm the judgment, except we reverse that part of the judgment sustaining the demurrer to the temporary nuisance cause of action described below.

I

The Masses live in a house in the City which has a backyard bordering a street named Corté de la Vista and which has a view of the La Costa resort, Batiquitos Lagoon and the Pacific Ocean. The prevailing ocean breeze allows them to avoid the installation of air conditioning. They spent $50,000 in improving their backyard.

On the south side of Corte de la Vista lies a 41-acre parcel of land owned by Fieldstone. When the Masses bought their house, they knew this parcel was planned for a subdivision known as the "Fairways Project" consisting of 132 homes with access from Alicante Road, a heavily traveled road on the west side of the parcel. However, the City later required that the single access gate be relocated from Alicante Road to Corte de la Vista at a [3] point just west of and across the street from the Masses' home. This change was required-by the City "for traffic safety purposes."

The City held a public hearing regarding approval of Fieldstone's tentative subdivision map, and the Masses received notice of and attended that hearing and Thomas spoke in opposition to relocation of the access street. However, the City approved the tentative map on January 8, 1991. Without notice to the Masses, the City approved the final map for the subdivision on September 3, 1991.

On October 18, 1991, the Masses sued the city and Fieldstone for inverse condemnation and nuisance, and petitioned for a writ of mandate alleging due process violations. Although the City and Fieldstone successfully demurred to the complaint and to the first amended complaint, the court granted the Masses leave to amend. In sustaining the demurrer to the Masses' second amended complaint, the court denied leave to amend the first two causes of action and allowed only the third

cause of action to proceed. Their third amended complaint contained only a cause of action for writ of mandates but restated most of the allegations of and sought the same relief as the previous complaints. However, it added an allegation of federal civil rights violations in addition to the due process allegations. A few weeks later, the Masses filed an amended and supplemental complaint, without leave, alleging new federal civil rights violations. The court sustained demurrers to the third amended complaint without leave to amend, struck the amended and supplemental complaint on its [4] own motion, and dismissed the action. The Masses moved to vacate the court's order dismissing their action and sought leave to file their amended and supplemental complaint. The court denied their motion and entered judgment for the City and Fieldstone.

II

The standard of review on a demurrer is summarized in Blank v. Kirwan (1985) 39 Cal.3d 311, 31B, superseded by statute on other grounds as noted in Wong v. Armstrong World Industries, Inc. (1991) 232 Cal.App.3d 1032, 1036.

> "In reviewing the sufficiency of a complaint against a general demurrer, we are guided by longsettled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable

possibility is squarely on the plaintiff. [Citation.]" (Blank v. Kirwan, supra, 39 Cal.3d at p. 318.)

A demurrer raises only a question of law, as the allegations of fact contained in the complaint must be accepted as true by the court for purposes of review. (Strang v. Cabrol (1984) 37 Cal.3d 720, 722; Thompson v. County of Alameda (1980) 27 Cal.3d 741, 746.) A demurrer tests the sufficiency of a pleading, and it is [5] error for a court to sustain a demurrer where the allegations adequately state a cause of action under any legal theory. (Von Batsch v. American Dist. Telegraph Co. (1985) 175 Cal.App.3d 1111, 1117; Banerian v. O'Malley (1974) 42 Cal.App.3d 604, 611.)

III

The Masses first contend the court erred in sustaining the demurrer to their first cause of action for inverse condemnation against the City. In particular, they assert the court misread their allegations in concluding there was no taking of private property for public purposes and misapplied an inapplicable statute of limitations.

In sustaining the demurrer to the first cause of action without leave to amend, the court stated:

> "Plaintiffs' first cause of action, for inverse condemnation, is deficient in that plaintiffs have failed to plead facts showing the loss of the primary use and value of their property. A temporary injury resulting from actual construction of public improvements is generally noncompensable. People ex rel. Department of Public Works v. Ayon (1960) 54 Cal.2d 217, 228. Plaintiffs have failed to plead facts giving rise to a claim for inverse condemnation.
>
> "Furthermore, plaintiffs' challenge to the validity of the relevant tentative and final maps is barred by the 90 day limitation period set forth in Govt. Code [section] 66499.37."

Independent of the reasons cited by the court in sustaining the demurrer, we review the first cause of action to determine whether it states a valid claim. Because we conclude it fails to [6] state a valid claim, we affirm the grant of the demurrer to the inverse condemnation cause of action.[1]

The complaint alleges the City required the relocation of the subdivision's access gate as a condition of its approval of the tentative subdivision map for Fieldstone's development. It further alleges a City employee stated this relocation was necessary "for traffic safety purposes." These allegations form the basis for the Masses' contention that relocation of the access gate was required by the City in furtherance of its regulation of traffic and, thus, constituted an action for a "public" purpose or use.

However, applicable case law does not support their contention As the court stated in Ullery v. County of Contra Costa (1988) 202 Cal.App.3d 562, 571:

> "Appellants misconstrue the law when they state that the subdivision map approval process represents a sufficient level of governmental involvement to constitute a public use or improvement subjecting the public entity to inverse condemnation liability. The cases do not stand for the proposition that approval alone creates liability in inverse condemnation."

That court concluded a "public use or improvement" was not shown by the government agency's approval of a subdivision map which [7] included a private drainage easement (and allegedly caused damage to the plaintiffs' homes), and it reasoned:

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[1] Inverse condemnation is an action based on the constitutional proscription against the taking (U.S. Const., 5th Amend.) or the taking or damaging (Cal. Const., art. I, § 19) of property for public use without just compensation. (Baker v. Burbank-Glendale-Pasadena Airport Authority (1985) 39 Cal.3d 862, 866.)

> "[I]nverse condemnation liability will not lie for damage to private property allegedly caused by private development approved or authorized by the public entity, 'where the [public entity's] sole affirmative action was the issuance of permits and approval of the subdivision map.' (Yox v. City of Whittier.) In Yox, liability in inverse condemnation was asserted for the city's issuance of permits and approval of allegedly defective design plans for a privately built development on a private street. . . . [T]he Court of Appeal concluded that the permit issuance and subdivision map approval alone did not constitute a public use." (Id. at p. 570.)

This case is apposite to Ullery v. County of Contra Costa, supra, 202 Cal.App.3d 562 and Yox v. City of Whittier (1986) 182 Cal.App.3d 347, in that the action-causing the alleged taking or damage to the Masses' property is the private property development by Fieldstone. The City owns no part of the development. The only alleged involvement of the City in the development is with respect to its approval of Fieldstone's subdivision map. If Fieldstone's initially proposed map had reflected the access gate location on Corté de la Vista and the City had merely given broad approval of the map without requiring any changes, the rule of the Ullery and Yox cases would undoubtedly apply as the City would have merely approved the subdivision map. Despite the Masses' assertion to the contrary, we conclude the City's condition requiring relocation of the access gate for approval of the subdivision map did not involve a "public" use or purpose within the context of inverse condemnation. Government agencies frequently require certain [8] changes in proposed subdivision maps as a condition to their approval. Such changes often include decreased density in the number of housing units, increased dedicated common areas, or reformation or redesign of streets. If we were to conclude that every change required by a governmental agency as a condition to approval of a subdivision map resulted in some "public" use or purpose rendering it liable for potential inverse

condemnation claims, the rule of the Ullery and Yox cases would effectively be subsumed by such exceptions and governmental agencies would be reluctant to require any changes to proposed maps which otherwise would be within their authority and in the best interests of the public. Accordingly, we conclude conditions or requirements imposed by governmental agencies for approval of subdivision maps for the development of private property do not constitute "public" uses or purposes which would subject those agencies to inverse condemnation liability. Since the City merely required the relocation of Fieldstone's access gate from one street to another and had no ownership interest in such private property, it cannot be liable for inverse condemnation. Thus, the demurrer to the Masses' first cause of action was properly sustained.

The Masses rely primarily upon the inapposite case of Harding v. State of California ex rel. Dept. of Transportation (1984) 159 Cal.App.3d 359. Although that case involved damage to private property similar to that alleged by the Masses (i.e., dust, dirt, and noise from construction of an adjacent highway) and found an inverse condemnation claim could be made, the crucial distinguishing factor is that the Harding case involved [9] property actually owned by the governmental agency which was developing the property. (Id. at pp. 362, 364-365.) Such use was unquestionably a "public" use-of property, and, as a result, is inapposite to the case at hand which involves merely private property and the City's approval of a subdivision map for that private property.

IV

The Masses next contend the court erred in sustaining the demurrer to their cause of action for nuisance against Fieldstone. It alleges that construction of the "Fairways Project" constitutes a nuisance and/or negligence by Fieldstone in that noise, noxious odors and dirt are blown onto their property and Fieldstone fails to take reasonable precautions to prevent, reduce, or mitigate such emissions. Such nuisance during construction is alleged to constitute a "continuing and temporary" nuisance. They also allege a "continuing and permanent" nuisance consisting of dust, dirt, odors, flashing

lights, and noise resulting from the anticipated increase in automobile traffic resulting from the relocation of the access gate to Corte de la Vista.

The court sustained the demurrer to the second cause of action without leave to amend, stating:

> "Plaintiff[s'] second cause of action is deficient in that the allegedly wrongful acts were admittedly undertaken with express public approval. A nuisance claim may not be brought for actions done or maintained under the express authority of a statute, per Civil Code §3482."

[10] The Masses contend the court erred in relying upon Civil Code[2] section 3482 as the basis for sustaining the demurrer.

Section 3482 provides, "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." Although that statute may normally apply in practice to governmental entities or agencies, its express terms do not so restrict its application. To the contrary, we conclude section 3482 may apply in appropriate circumstances to nongovernmental entities or persons.

To the extent the second cause of action alleges a continuing and permanent nuisance resulting from increased automobile traffic due to relocation of the access gate, we conclude the basis of this claim is action taken by the City which it is expressly authorized by statute. The Subdivision Map Act (Gov. Code, § 66410 et seq.) authorizes the City to review and approve proposed subdivision maps. Inherent in that express approval authority is review of proposed maps and imposition of reasonable conditions for approval of such maps. The City's requirement of relocation of the access gate "for public safety purposes" was one such reasonable condition imposed for approval of Fieldstone's subdivision map. As such, not only is the City exempt from nuisance liability under section 3482, but Fieldstone is also exempt from nuisance liability to the extent

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2 All statutory references are to the Civil Code unless otherwise specified.

the nuisance allegations relate to and arise out of relocation of the access [11] gate. Thus, the claim for the "continuing and permanent" nuisance alleged by the Masses resulting from increased automobile traffic due to relocation of the access gate is precluded by section 3482, and the court correctly sustained the demurrer to this extent.

However, the court erred in finding section 3482 precluded the Masses' nuisance claim against Fieldstone in its entirety. As mentioned above, they also allege a nuisance was caused during construction of the subdivision consisting of noise, dirt, and odors, and Fieldstone failed to mitigate or take reasonable measures to prevent such emissions. Section 3482 does not authorize developers to create unreasonable dirt, noise, and odors merely because a governmental agency approved their subdivision maps. In upholding dismissal of a nuisance claim against a governmental agency, one court stated:

> "When a public entity is authorized by statute to construct and maintain a facility and there is no evidence that the action was done in an unreasonable manner or is unreasonably noisy or dirty, no cause of action for nuisance exists." (Harding v. State of California ex rel. Dept. of Transportation, supra, 159 Cal.App.3d at p. 363.)

Implicit in this statement is a conclusion that an action for nuisance would exist if "unreasonable" noise and dirt or other harmful actions were alleged. (See also Venuto v. Owens-Corning Fiberglass Corp. (1971) 22 Cal.App.3d 116, 128-129.) This is exactly what the Masses allege regarding the "continuing and temporary" nuisance caused during the construction phase of Fieldstone's project. Such nuisance does not relate solely to [12] the access gate relocation, so section 3482 does not preclude this aspect of the Masses' nuisance claim. Accordingly, to the extent the court sustained the demurrer to the second cause of action for nuisance arising out of the temporary construction phase of Fieldstone's project, the

court erred and we remand the matter for further proceedings consistent with this opinion.[3]

V

The Masses also argue the court erred in sustaining the demurrer to their cause of action alleging their due process rights were violated by inadequate notice and hearing of the City's subdivision map approval, thereby nullifying the City's action as unconstitutional. They seek writ of mandate relief to set aside the City's approval of the tentative and final subdivision maps. In their third amended complaint, other than restating much of the substance of the first two causes of action to which demurrers were properly sustained (except for the temporary nuisance claim against Fieldstone), they added an allegation that their federal civil rights were violated (namely, 42 U.S.C. § 1983).

In sustaining the demurrer to the third cause of action without leave to amend, the court stated:

> [13] "It appears that plaintiffs are attempting to restate their causes of action under a new theory of federal [civil] rights violations. Plaintiffs have failed to set forth an intelligible pleading. It is impossible for the court to determine whether plaintiffs have stated sufficient facts to maintain a cause of action under 42 U.S.C. §§1[9]83, 1985, 1986 and 1988.
>
> "The plaintiffs have also failed to state sufficient facts to support a cause of action for a writ of mandate. The reasoning or wisdom underlying the planning commission's action in approving the

---

[3] Fieldstone meritlessly alleges the provisions of Government Code section 66499.37 required the Masses to assert their nuisance claim against it within 90 days of the City's approval of the tentative subdivision map. However, it cites no authority for such position, and that statute expressly purports to relate only to challenges to approvals of subdivision maps and not to nuisances arising during construction of those subdivisions.

tentative and final maps are beyond the scope of judicial inquiry. [See, Faulkner v. Cal. Toll Bridge Authority, (1953) 40 Cal.2d 317]. Additionally, the action taken by the planning commission does not appear to be arbitrary or capricious. [See, Stauffer Chemical Co. v. Cal. State Air Resources Board (1982) 128 Cal.App.3d 789.]

"In their third amended complaint plaintiffs have re-alleged much of what the court has already sustained [a demurrer] without leave to amend. The court has given the plaintiffs ample opportunity to correct the defects in their pleadings. Plaintiffs have failed to do so. As there does not appear to be any reasonable possibility that plaintiffs can state a viable cause of action[,] the demurrer is sustained without leave to amend and this action is dismissed."

To the extent the Masses seek to nullify the tentative map approval, that claim is barred by that part of the provisions of Government Code section 66499 37 which states in part:

"Any action or proceeding to attack, review, set aside, void or annul the decision of an advisory agency, appeal board or legislative body concerning a subdivision, or of any proceedings, acts or determinations taken, done or made prior to such decision, or to determine the reasonableness, legality or validity of any condition attached thereto, shall not be maintained by any person unless such action or proceeding is commenced and service of summons effected within 90 days after the date of such [14] decision. Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts-or determinations." (Italics added.)

The tentative map was approved by the City on January 8, 1991, but the Masses' complaint was not filed until October 18, 1991, well beyond the 90-day limitations period which bars "all persons" from challenging the City's decision approving the tentative subdivision map. (Gov. Code, § 66499.37.) Accordingly, they cannot challenge the tentative map.

To the extent they challenge the City's approval of the final subdivision map, we conclude the City's approval was not a discretionary action giving rise to a valid claim. Although their complaint was filed within 90 days after the City's approval of the final map (i.e., Sept. 3, 1991), Government Code section 66474.1[4] effectively made the City's decision nondiscretionary. Because the Masses fail to allege the final map was not in substantial compliance with the tentative map, we presume the City was required to approve the final map. (Youngblood v. Board of Supervisors (1978) 22 Cal.3d 644, 655, 656.) As the Masses contend the harm caused them arises out of relocation of the access gate as a condition to approval of the tentative map, the crux of their claim is wrongful approval of the tentative map and not the final map. Thus, the 90-day [15] limitations period does not begin to run anew upon the City's ministerial approval of the final map. (Griffis v. County of Mono (1985) 163 Cal.App.3d 414, 422; Camp v. Board of Supervisors (1981) 123 Cal.App.3d 334, 359; Soderling v. City of Santa Monica (1983) 142 Cal.App.3d 501, 506.)

Responding to the claim that due process rights were violated, we conclude the Masses received adequate notice and had an opportunity to be heard before the City made its discretionary decision regarding the tentative map. They admit receiving notice of the hearing and attending the hearing which was held on December 18, 1990. Further, Thomas spoke in opposition to the proposed subdivision and, in particular, to

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4 Government Code section 66474.1 provides: "A legislative body shall not deny approval of a final or parcel map if it has previously approved a tentative map for the proposed subdivision and if it finds that the final or parcel map is in substantial compliance with the previously approved tentative map."

relocation of the access gate. Thus, to the extent they may have been deprived of a significant property interest, they received sufficient notice and opportunity to be heard. (Horn v. County of Ventura (1979) 24 Cal.3d 605, 612.) The failure of the City's notice to inform them that the tentative map approval was its "final" discretionary act or that they would need to challenge such approval within 90 days is not inadequate notice for constitutional due process purposes. Further, the time limitation upon their opportunity to speak at the hearing and the lack of opportunity to "cross-examine" Fieldstone or City representatives do not result in an inadequate hearing in this context. (Rossco Holdings, Inc. v. State of California (1989) 212 Cal.App.3d 642, 658-660.) Finally, lack of notice and opportunity to be heard regarding the City's approval of the final map did not violate the Masses' due process rights, because [16] no notice and hearing were constitutionally required to be provided them. As noted above, the City's approval of the final map was nondiscretionary, so no deprivation of property interests by the City could have occurred upon such approval. (Horn v. County of Ventura, supra, 24 Cal.3d at p. 616.)

To the assertion that federal civil rights were violated, we conclude the Masses failed to allege deprivation of a property interest protected by the federal civil rights statute which provides in relevant part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (42 U.S.C. § 1983.)

This statute provides a remedy, but no substantive rights. (Chapman v. Houston Welfare Rights Org. (1979) 441 U.S. 600, 617620.) Thus, the Masses must first allege they have been

wrongfully deprived of protected rights which are founded in the United States Constitution or federal law. (Jones v. Gutschenritter (8th Cir. 1990) 909 F.2d 1208, 1211.) However, the approval by a governmental agency of subdivision maps or similar permit or zoning decisions do not involve those "fundamental" rights protected by the federal civil rights statute. (See, e.g., New Burnham Prairie Homes v. Village of Burnham (7th Cir. 1990) 910 F.2d 1474, 1480; Marine One, Inc. v. Manatee County (11th Cir. 1989) 877 F.2d 892, 894; Love v. [17] Navarro (C.D.Cal. 1967) 262 F.Supp. 520, 522-523, Muckway v. Craft (7th Cir. 1986) 789 F.2d 517, 521 [zoning decisions regarding neighboring property].)

Thus, the court did not err in sustaining the demurrer to the third cause of action.

VI

The Masses had fully three opportunities to amend their complaint in order to state valid causes of action. We conclude under the circumstances of this case the court gave them all reasonable opportunity to attempt to state valid causes of action before sustaining the demurrers without leave to amend.[5] Based on the record,-it does not appear further opportunities to amend their complaint would have resulted in statement of valid causes of action, so we conclude the court did not abuse its discretion in denying leave to amend. (Blank v. Kirwan, supra, 39 Cal.3d at p. 318; Mitchell v. Franchise Tax Board (1986) 183 Cal.App. 3d 1133, 1137.)

We similarly conclude the court did not abuse its discretion in striking the amended and supplemental complaint. The amended and supplemental complaint did not allege anything substantively different from the three previously filed amended complaints. Accordingly, in light of its redundancy and late filing without leave of the court, the court did not abuse its

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5 Of course, as discussed~above, we conclude the Masses succeeded in stating a valid cause of action for the continuing and temporary nuisance allegedly caused them by Fieldstone during the construction phase of the project.

discretion in [18] striking this complaint. (Code Civ. Proc., §§ 464/ 472; Neal v. Bank of America (1949) 93 Cal.App.2d 678, 682-683; Rose v. Ames (1942) S3 Cal.App.2d 583, 589; Roemer v. Retail Credit Co. (1975) 44 Cal.App.3d 926, 939.)[6]

DISPOSITION

We affirm the judgment, except we reverse the court's grant of the demurrer to that part of the second cause of action which alleges a continuing and temporary nuisance against Fieldstone during the construction phase of the development, and we remand this matter for further proceedings consistent with this opinion. The parties to bear their own costs of appeal.

WORK, Acting P.J.

WE CONCUR:
TODD, J.
NARES, J.

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6 Based on our discussions above, we need not address the Masses' meritless contention that a short statute of limitations requires notice to them in order to be constitutional under the mandamus provisions of Code of Civil Procedure section 1094.6.

FILED
Jul 6 1994
Court of Appeal Fourth District

COURT OF APPEAL, FOURTH APPELLATE DISTRICT,
DIVISION ONE
STATE OF CALIFORNIA

THOMAS A. MASS and JANET A. MASS,
Plaintiffs and Appellants,

v.

CITY OF CARLSBAD, et al.,
Defendants and Respondents.

Court of Appeal No. DO18305
(Super. Ct. No. N53303)

THE COURT:

The petition for rehearing is denied.

WORK, Acting P.J.

Copies to: All parties

EXHIBIT B

Fourth Appellate District, Division One No. DO18305
SO41190

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

THOMAS A. MASS Et Al., Appellants

v.

CITY OF CARLSBAD Et Al., Respondents

Appellants' petition for review DENIED.

MOSK
Acting Chief Justice

EXHIBIT C

COURT OF APPEAL - STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
Division One

Office of the County Clerk
San Diego County
220 W. Broadway Street
San Diego, CA. 92101

RE: MASS, THOMAS A.
Plaintiff-Appellant
v.
CITY OF CARLSBAD
Defendant-Respondent
D018305
San Diego County No. N53303

** REMITTUR **

I, Stephen M. Kelly, Clerk of the Court of Appeal of the State of California, for the Fourth Appellate District, certify the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on June 17, 1994, and that this opinion or decision has now become final.

____ Appellant ____Respondent to recover costs.
__√__ Each party to bear own costs.
____ Costs are not awarded in this proceeding.

Witness my hand and the seal of the court affixed this September 26, 1994.

STEPHEN M. KELLY, Clerk
By Jean Cook
Deputy Clerk
SEAL OF COURT OF APPEAL

cc: All Counsel (Copy of remittitur only, California Rules of Court, rule 25(e)).

EXHIBIT D

FILED
Nov 08 1994
By: A. Lum, Deputy
Vista Branch

SUPERIOR COURT OF THE STATE OF CALIFORNIA

THOMAS A. MASS and JANET A. MASS,
Plaintiffs,
v.
CITY OF CARLSBAD, a Municipal Corporation;
FIELDSTONE/LA COSTA ASSOCIATES LIMITED
PARTNERSHIP, a California Limited Partnership,
Defendants.

Case No. N53303

ORDER FOLLOWING REMITTITUR

Pursuant to the opinion rendered by the Fourth District Court of Appeals, Division One and remittitur entered on September 26, 1994, this Court orders as follows:

The Court's order of July 27, 1992 sustaining the general demurrer of Defendants to me second cause of action for nuisance of Plaintiffs' second amended complaint is reversed.

A follow-up hearing shall be held on December 14, 1994 at 9:30 AM in Department E of the above-entitled Court to discuss the scheduling of trial for the remaining cause of action for nuisance against Defendant Fieldstone/La Costa Associates Limited Partnership. All remaining parties are ordered to appear.

The judgment is affirmed as to Defendant City of Carlsbad.

IT IS SO ORDERED.

Date: Nov 08 1994

THOMAS R. MURPHY
Judge of the Superior Court

EXHIBIT E

Supreme Court, U.S.
FILED

941018 DEC 2 1994

OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THOMAS A. MASS, pro se and JANET A. MASS,
Petitioners,

v.

CITY OF CARLSBAD, a Municipal Corporation;
FIELDSTONE/LA COSTA ASSOCIATES LIMITED
PARTNERSHIP, a California Limited Partnership,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division One

APPENDIX VOLUME I
(Petitioners' Selected Complaints)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

THOMAS A. MASS and JANET A. MASS, Plaintiffs

v.

CITY OF CARLSBAD, a Municipal Corporation; FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP, a California Limited Partnership, Defendants

Case No. N53303

SECOND AMENDED COMPLAINT FOR INVERSE CONDEMNATION, NUISANCE AND/OR NEGLIGENCE, REQUESTING DECLARATORY RELIEF, AND IN THE ALTERNATIVE, A WRIT OF MANDATE

PLAINTIFFS RESPECTFULLY REPRESENT:

FIRST CAUSE OF ACTION
(Inverse Condemnation)
(Plaintiffs vs. "The City" Defendants)

1. Plaintiffs are the owners and reside in the following described real property in the city of Carlsbad, San Diego County, California:

> Lot 26 of Carlsbad Tract No. 81-29 in the City of Carlsbad, County of San Diego, State of California, according to Map thereof No. 11423, filed in the Office of the County Recorder of San Diego, January 20, 1986, and commonly known as 2851 Torry Court.

2. The above described property is contiguous to said Torry Court on the north and Corte de la Vista on the south and is within a gated community known as Alicante Hills and is

bounded on the east by Bolero Street and on the west by Alicante Road.

3. The plaintiffs' home is a free standing single family residence with a 35' x 50' terrace on the ground floor, and a 10' x 40' balcony on the second floor which fronts on said Corte de la Vista.

4. Said terrace and balcony afford a 180` panoramic view overlooking the La Costa Golf Course and a direct and unobstructed forever view of the Batiquitos Lagoon and the Pacific Ocean, as well as the year round prevailing ocean breeze which is the property's primary use and value.

5. The plaintiffs' property is contiguous to the "Fairways Project" of the defendant Fieldstone/La Costa Associates Limited Partnership ("The Developer"), which is a planned development of 132 single family detached residences located south of Corte de la Vista, east of Alicante Road and north of the La Costa Golf Course.

6. The defendant City of Carlsbad is a public entity chartered and existing under the laws of the State of California ("The City").

7. That pursuant to the authority of the Subdivision Map Act "S.M.A." (Government Code §§ 66410-66499.37) "The City" adopted a "Subdivision Ordinance" (9417 § 2 (part) 1975) contained in Title 20 of the Municipal Code and at all times herein mentioned both the statute and ordinance were in full force and effect.

8. That pursuant to said statute and ordinance "The Developer" applied to "The City" for the approval of a planned unit development, hillside development, and a subdivision map (CT90-23/PUD 90-23/HDP 90-29), and the issuance of the related permits (map).

9. That on or about the 8th day of January 1991, "The City" approved the tentative map and on or about the 3rd day of September 1991, "The City" approved the final map for the construction of 132 single family detached homes on 41.09 acres known as "The Fairways Project."

10. "The Developer's" original plan and map and its application to "The City" requested that the location of the

access to the project should be on Alicante Road. "The City" denied the request and insisted that the access be moved to Corte de la Vista as a condition for the issuance of the necessary approval. An employee of the Planning Department of "The City" testified before the Planning Commission of "The City" at their meeting of October 3, 1990, in part as follows:

> "The project is proposed as a gated community. The gate design is single access off Corte de la Vista and it provides a turnaround area at the entrance. The location of the single access was dictated by staff. The original proposal came in with an access off Alicante Road; however, for traffic safety purposes, staff requested that the entrance be moved to Corte de la Vista." (See page 2 of plaintiffs' group Exhibit E.)

11. Alicante Road is a heavily traveled secondary road, Corte de la Vista is a low use residential street, approximately one-quarter of a mile long, ending with a dead end cul-de-sac on the east end and in a "blind" exit onto Alicante Road on the west end.

12. "The City's" Planning Department, Planning Commission and the City Council all relied and supported their decision to relocate the gate on considerations of the public safety, for the public at large, and not for any private purpose or use, including "The Developer" and the successor occupants of the project.

13. "The City's" requirement that "The Developer" relocate the access to the project for ingress and egress ("the gate") was for the express purpose of regulating traffic which is a function of government for the benefit of the public, and as such serves a public purpose and use. Traffic regulations was the public "improvement." The act of relocating "the gate" directly and wrongfully diverted the heavy traffic from Alicante Road and re-routed it to Corte de la Vista thereby increasing, unreasonably and excessively, the volume of traffic, and destroying the residential environment of the plaintiffs' home.

"The gate" will be constructed in its new location by "The Developer" as authorized and directed by "The City" and subject to its approval, and said gate will be accepted by "The City" by "The City's" integrating "the gate" into its public roadways.

14. That both Alicante Road and Corte de la Vista are public improvements and part of the public roads owned and maintained by "The City." The relocation of "the gate" by "The City's" affirmative action was not only by its substantial participation, but the sole and direct cause of creating and causing the condition that will result in the damaging and/or taking plaintiffs' property by the trespass, nuisance and air pollution more fully described elsewhere in plaintiffs' complaint.

15. As a direct result thereof, the flow of traffic will all enter and exit on Corte de la Vista which is a public street and not a private driveway, and integrated into the public streets on the admitted grounds for the public safety of the community as a whole and will dramatically and adversely increase the volume of traffic and change the residential environment.

16. The plaintiffs' homes are all oriented to take full advantage of the gallery location above Corte de la Vista so as to enjoy the 180 degree panoramic view and prevailing winds of the ocean. As shown in Exhibit B20 the plaintiffs' property is elevated above the street and the panoramic view is not affected. The prevailing wind from the ocean is in the direction to take the air pollution alleged elsewhere herein and waft it directly on plaintiffs' terrace and balcony to their damage. The "Fairways Project" as originally planned and submitted to "The City" for approval was not and has not been objected to by plaintiffs; as a matter of fact it was relied on by them in making the purchase of their home and improving the terrace with a Bar-B-Q and spa as seen in plaintiffs' group Exhibit B1-20. Neither the view nor the ocean breeze would be adversely affected by the original plan. It was "The City's" action in relocating the gate and changing the traffic pattern of a public street for the public use, for the public safety, which is the cause of the air pollution herein alleged.

17. That "The City's" taking is official governmental action in requiring that "The Developer" locate the access to the "Fairways Project" on Corte de la Vista, determined (albeit, mistakenly) that the safety concerns of the whole community would best be served by that location.

18. That as a direct and necessary result of the aforesaid official governmental action, the noise, dirt, odor, air pollution, flashing headlights and vibrations cause, and will continue to cause, a substantial interference with the use and enjoyment by plaintiffs of plaintiffs' homes, the loss of reasonable investment-backed expectations, and a diminution in its primary use and value.

19. That the governmental authorities acting on behalf of "The City" affirmatively required "The Developer" to locate the access in proximity to the plaintiffs' property, and "The Developer" carried out the governmental mandate exactly as required, so that said location of the access was in fact the official affirmative action of "The City". That based upon the above and foregoing, "The City" has "taken" and/or damaged the plaintiffs' property for a public use and has not given the plaintiffs "just compensation."

20. "The City" has an existing ordinance which at all times herein mentioned was in full force and effect, to wit: "Interim Traffic impact fee for Southeastern Area (La Costa)."

21. Subsection 18.42.020(e) of said Traffic ordinance defined "Trip" as follows: "Trip" means arrival at or a departure from a project by any motor vehicle averaged over a one-day period (12:01 a.m. to 11:59 p.m.) as determined according to Table 18.42.020(e).

22. That the Table (18.42.020(e)) provides that a single-family detached residence can be expected to generate ten "trips" on each weekday. That the 132 homes to be constructed in the "Fairways Project" will result in generating 1,320 "trips" each week-day.

23. The Court will take judicial notice that there are 1,440 minutes in each one day period; and that one motor vehicle every minute, entering and exiting a gate, together with braking

and accelerating within a one block distance will cause air and noise pollution to the plaintiffs and their property.

24. As a direct result and as a proximate consequence of the dust, dirt, debris, noxious odors, flashing lights and noise, the plaintiffs have been and will continue to be peculiarly and substantially damaged. That "The City," by locating the access to the "Fairways Project" across the street from the plaintiffs' homes, has caused an invasion and appropriation of their valuable property rights and their investment-backed expectations, which has rendered their property untenantable to the plaintiffs, being the essence of why they purchased the property for their residence and paid a premium for its location and view and constitutes a loss of its primary use and value and thus is a compensable taking under Article I, Section 19 of the California Constitution, as well as the Fifth Amendment of the federal Constitution.

25. That based upon the factual allegations herein, the plaintiffs state the facts to be and allege as follows:

(a) That the nuisance-trespass type activity that results from the traffic generated has caused a diminution in the value of the plaintiffs' property and has substantially interfered with their use and enjoyment of their homes by imposing on them a direct, peculiar and substantial burden, and as such, they are entitled to just compensation as a result of the taking and/or damaging of their property;

(b) That the air pollution caused by the traffic is effective physical appropriation, occupation or interference of a permanent nature by contaminating the air over their property, with toxic and non-toxic gaseous solids and/or liquids, and constitutes a compensable taking or damage and that this is true whether the relocation of the gate achieved an important public benefit or had only a minimal economic impact on the plaintiffs;

(c) That even if the effects of the relocation of the gate across from plaintiffs' property was not a possessory type of activity as hereinabove alleged and only constitutes a non-possessory type interference, the extent to which "The City's" decision has damaged or destroyed the plaintiffs' distinct

investment-backed expectations, as hereinabove alleged, are compensable, and the plaintiffs are entitled to just compensation.

(d) That the view and the prevailing ocean breeze were not the primary reasons why the plaintiffs purchased their home and improved the terrace at an additional cost of $50,000.00. They were the only reasons! The view and the breeze is still there but because of the nuisance, trespass and air pollution described herein, the plaintiffs have been denied use of these features. They have been denied the use of their terrace because of the dirt, noise and odors; and that although the view can be enjoyed from indoors, the house cannot be ventilated and cooled through open windows and doors by the ocean breeze because of the same dirt, noise and odors more fully described elsewhere herein, which make opening the doors and windows prohibitive;

(e) The plaintiffs purchased their home to enjoy the out-of-doors living and comfortable indoor living without air-conditioning, and both features have been substantially and significantly damaged and/or destroyed by the defendants and each of them as herein alleged;

(f) The plaintiffs have incorporated a group of photographs into their group Exhibit B1-20 which demonstrates in a tangible and concrete manner that what has been alleged as the reason for their purchase and subsequent improvements was not an after-thought but was a distinct investment-backed expectation.

26. That notwithstanding that no claim is required to be filed against "The City" by the plaintiffs in order to maintain their action (Government Code § 905.1), the plaintiffs did on the 26th of September, 1991, deliver to "The City" a copy of a first draft of a complaint, which included a cause of action for inverse condemnation.

27. As a result of the above-described damages to the names plaintiffs' property, they have been damaged in excess of one hundred thousand ($100,000.00) dollars, and by this reference plaintiffs here incorporate the specific allegations of damages in this complaint set forth.

28. As a direct and proximate cause of "The City's" relocating the gate from Alicante Road, the pattern and volume of traffic on Corte de la Vista has resulted in the creation of the nuisance and air pollution herein alleged.

29. Plaintiffs have received no compensation for their damages, nor has "The City" instituted eminent domain proceedings.

30. "The City's" decision to relocate the gate without paying to the plaintiffs the just compensation for the damage and/or taking of their property, is in violation of plaintiffs' due process rights, equal protection rights, proportionality rights, liberty and privacy rights, and the takings and/or damaging clause of both the state and federal Constitutions, both as applied and on its face.

31. The plaintiffs' property rights to exclude has been violated by the governmental decision which resulted in an invasion and interference with their right of a personal sanctuary in their homes.

32. "The City," by its decision and failure to justly compensate the plaintiffs, has deprived the plaintiffs of their constitutional right to a jury to determine their damages.

33. Plaintiffs have incurred and will incur attorneys', appraisal, environmental experts and engineering fees because of this proceeding, in amounts that cannot yet be ascertained, which are recoverable in their action under the provisions of Section 1036 of the Code of Civil Procedure.

34. An actual controversy has arisen and now exists between the plaintiffs and the defendants as to the legal consequences resulting from the facts that have and will occur as hereinabove alleged.

35. Plaintiffs desire a judicial determination of their rights and duties, and a declaration that they may pursue their remedies for damages.

36. A judicial declaration is necessary and appropriate in order that the parties may take appropriate steps to mitigate their damages; and will also serve considerations of judicial economy.

WHEREFORE, plaintiffs pray judgment against "The City" as follows:

A. A declaration of the rights and duties of the parties;

B. To permit the cause of action to pend the completion of construction and the sale of all the homes in the "Fairways Project;"

C. Thereafter, set the matter down for a jury trial to determine the amount of just compensation for the plaintiffs and each of them, together with interest at the legal rate from the date of the damages;

D. For reasonable attorneys', appraisal, environmental experts, and engineering fees, according to proof;

E. For costs of suit herein incurred; and

F. For such other and further relief as the Court may deem proper.

SECOND CAUSE OF ACTION
(Nuisance)
(Plaintiffs vs. "The Developer" Defendants)

37. Plaintiffs incorporate paragraphs 1 through 5 both inclusive of their First Cause of Action as though fully set out here.

38. "The Developer" is the largest single land owner of residential real estate in the La Costa area of the City of Carlsbad. It is, and has been for a number of years, actively engaged in planning and constructing new residential communities and holds itself out and does business under the assumed name of "Fieldstone of La Costa."

39. "The Developer" has a large staff and retains outside consultants and contractors to plan and develop its new subdivisions. "The Developer" has been working with "The City" for five years or more on its "Fairways Project."

40. The plaintiffs are informed and believe and thereon allege that in "The Developer's " original plan for the "Fairways Project" submitted to both the planning department and the planning commission of "The City," they located the access to said project on Alicante Road.

41. That the plaintiffs, prior to purchasing their home, investigated the proposed development below and adjacent to their property and were satisfied as to the proposed density, height and style of the homes to be built, and also relied on the location of the gate which was to be on Alicante Road. At that time, plaintiffs had no reason to believe that the gate to the development would be relocated across the street from them and would result in the nuisance, negligence, trespass and air pollution caused by the increased volume of traffic to their home. Plaintiffs were the first purchasers and selected their location over the other thirty-seven that were available.

42. The plaintiffs were justifiable in their reliance on these facts, as well as the residential character of the road that they would be contiguous to, never expecting "The City" to divert the heavy traffic of Alicante Road to Corte de la Vista and to relocate the gate to the project across the street from their home, or "The Developer" to concur.

43. The first notice that the plaintiffs had that the access may be located on Corte de la Vista (across the street from plaintiffs' homes) was on or about the 10th day of May, 1990, at "The Developer's" local office in La Costa.

44. The plaintiffs promptly made their objections to the location of access to the "Fairways Project" to "The Developer;" to "The City's" Planning Department and Planning Commission; as well as to the City Council.

45. "The Developer" never made any public objection to "The City's" decision to relocate the access of the "Fairways Project" (sometimes hereinafter referred to as the property in question, P.I.Q.). "The Developer" also failed to exhaust its administrative remedies or seek judicial review of "The City's" decision. "The Developer" knew or should have known that the relocating of the only gate to the "Fairways Project" to Corte de la Vista would result in damages to the property of others, and result in a nuisance, negligence, trespass and air pollution, but breached its duty to plaintiffs by failing to take any action to prevent or mitigate that result.

46. Commencing in August of 1991, "The Developer," with "The City's" full authorization, direction and approval,

commenced construction of "The Fairways Project" in a manner which constitutes a nuisance and/or negligence. Noise, noxious odors and dirt in the form of dust are blown onto plaintiffs' property by prevailing winds by "The Developer's" failure and refusal to take all necessary and reasonable precautions to prevent, reduce, or mitigate the emissions as aforesaid.

47. The aforementioned occupation, use, and maintenance of the P.I.Q. constitutes a nuisance within the meaning of Section 3479 of the Civil Code and is the proximate cause of its damages. Such occupation substantially and unreasonably interferes with the comfortable use and enjoyment of plaintiffs' property, and may well be harmful to plaintiffs' health.

48. On or about August 7, 1991, the plaintiff gave written notice to the "The Developer" of the injury the plaintiffs have experienced and expect to experience in the future (see plaintiffs' Exhibit "A"). Plaintiff requested "The Developer" to abate such unreasonable activity, but they have refused and continue to refuse to abate the nuisance and negligence as aforesaid.

49. As a proximate result of the nuisance created by "The Developer" and its acts and omissions as aforesaid, plaintiffs have been, and will be damaged by: (a) being denied the full use and enjoyment of their property; (b) the cost and or personal labor in cleaning the walks, furniture, windows and other appurtenances on a daily basis; (c) the value of the property has and will decline unless this nuisance is abated; (d) and may be hazardous to the plaintiffs' health.

50. In maintaining the nuisance and its acts of commission and omission as aforesaid, "The Developer" is acting with full knowledge of the damages being caused plaintiffs. Defendant's conduct is willful, oppressive and malicious. Accordingly, plaintiffs are entitled to punitive damages against defendants.

51. The above described dust, dirt, odors and noise have persisted and continue to persist. Plaintiffs have been denied the valuable use and enjoyment of their terrace and have been forced to keep their doors and windows closed. The focal point of plaintiffs' property is the terrace, for the view and the

prevailing winds from the ocean, all aspects of which have been destroyed or substantially reduced; they are the primary reason for the value of the property and the exclusive reason why plaintiff purchased the property and spent in excess of $50,000.00 to enhance the outdoor terrace (see Group Exhibit "B").

52. The activities above described interfere with plaintiffs' possession of their property and constitutes a continuing and temporary nuisance to plaintiffs. Unless "The Developer" abates such conduct, the plaintiffs will be denied the full use and enjoyment of their property during the site preparation, which is scheduled for a year, and construction, which could take several years.

53. The vibrations, fumes and noise are offensive to the senses and deny plaintiffs the free use and enjoyment of their property. Such interference with plaintiffs' comfortable enjoyment of life and property has resulted in the substantial reduction in the market value of their property.

54. The nuisance and negligence described above is "continuing" and will presumably come to an end. However, the nuisance that can be expected to start when construction is complete and the 132 homes are occupied, will be a "continuing and permanent" nuisance.

55. "The City" has an existing ordinance which at all times herein mentioned was in full force and effect, to wit: "Interim Traffic impact fee for Southeastern Area (La Costa)."

56. Subsection 18.42.020(e) of said Traffic ordinance defined "Trip" as follows: "Trip" means arrival at or a departure from a project by any motor vehicle averaged over a one-day period (12:01 a.m. to 11:59 p.m.) as determined according to Table 18.42.020(e).

57. That the Table (18.42.020(e)) provides that a single-family detached residence can be expected to generate ten "trips" on each weekday. That the 132 homes to be constructed in the "Fairways Project" will result in generating 1,320 "trips" each week-day.

58. The Court will take judicial notice that there are 1,440 minutes in each one day period; and that one motor vehicle

every minute, entering and exiting a gate, together with braking and accelerating within a one block distance will cause air and noise pollution to the plaintiffs and their property.

59. That as a direct and proximate cause of the dust, dirt, debris, noxious odors, flashing lights at night and street noise, the plaintiffs have been and will continue to be peculiarly and substantially damaged.

60. That the location of the access to the "Fairways Project" across the street from the plaintiffs' homes has caused a destruction of the valuable property rights and rendered their property untenantable. The unique property rights formerly enjoyed by the plaintiffs was the essence of the reason they purchased the property and paid a premium for its location and view.

61. The view is still there but cannot be enjoyed because of the dirt, noise and air pollution, as aforesaid.

62. The essence of the nuisance and/or negligence hereinabove described is that it damages, if not destroys, the plaintiffs' personal enjoyment of their terrace. It also has the effect of lessening the value of the property and may affect the health of the plaintiffs. It also requires that doors and windows be kept closed at all times, thereby will be forcing the plaintiffs to install air conditioning which they cannot tolerate.

63. The nuisance herein described is both a private and public nuisance which affects the entire neighborhood. "The Developer" has negligently caused or allowed the emission of fugitive dust from its active operation, use of unpaved roads, open storage pile, demolition, and disturbed surface area, so that the presence of such dust remains visible in the atmosphere above plaintiffs' property and deposits large amounts of visible particulate matter on plaintiffs and their property as a direct result of "The Developer's operations. "The Developer" has failed and refused to take all reasonable and necessary precautions to prevent, reduce, or mitigate the emissions as aforesaid. Upon completion of the project "The Developer" or its successors-in-title will cause continued air pollution, increasing the amount of ozone, exhaust contaminants, carbon monoxide, and fine particles that will be injurious to plaintiffs

and their property as herein more fully alleged, all as a direct result of their acts and omissions as aforesaid.

64. The "continuing" but temporary nuisance started in August 1991, and is expected to continue for at least a year. The permanent and continuing nuisance will take its place when construction is complete and the new owners occupy their residences. This permanent nuisance will remain in effect from that point on or unless abated, which is unlikely.

65. The nuisance is based on fault, and also on the basis of one person's property and/or activity injuring another's person and/or property, as well as "The Developer's" acts and omissions as aforesaid.

66. As a proximate result of the nuisance and/or negligence the value of plaintiffs' real property has been diminished by not less than $100,000.00, and further, they have been denied the full use and enjoyment of their property, and unless the nuisance is abated, plaintiffs' property will be progressively further diminished in value.

67. The exact damages that have been and will continue to be inflicted on the plaintiffs cannot at this time be determined, but will include loss of value, loss of use, clean-up expenses, repairs, and possible personal injuries and great physical, mental, and nervous pain and suffering. As a result of such injuries, plaintiffs have suffered general damages in an amount according to proof.

68. In maintaining the nuisance and its continuing negligence, "The Developer" is acting with full knowledge of the consequences and damage being caused to the plaintiffs, and their conduct is willful, oppressive, and malicious. Accordingly, plaintiffs are entitled to punitive damages against "The Developer" in a sum to be determined by the jury.

69. "The Developer" has failed to minimize the pollution caused by their site preparation, and further, has failed to implement a program of clean-up activities so as to allow the plaintiffs to make full use and enjoyment of their outdoor terrace entertainment center.

70. The successor in title to "The Developer" will be the 132 homeowners. Unless the new owners abate the nuisance or

are enjoined from continuing the nuisance, the plaintiffs will suffer permanent and continuing damages. The result of such nuisance will cause the plaintiffs irreparable injuries such as usefulness, the economic value of the plaintiffs' property will be substantially diminished, and the plaintiffs will be deprived of the comfortable enjoyment of their property.

71. The location of the access to the "Fairways Project" has an effect on the possession of the real estate that the prospective purchasers will occupy as their residences.

72. That because plaintiffs may seek a permanent injunction against the prospective owners, and further, because the possession of residences will be affected by the location of the access to the "Fairways Project," it is reasonable and necessary to give them actual or constructive notice of the pendency of this action, as well as the current and subsequent encumbrances.

73. An actual controversy has arisen and now exists between "The Developer" and their successor in title. That considerations of judicial economy as well as providing the parties an opportunity to mitigate their damages make a judicial declaration both necessary and appropriate.

74. The Civil Code §3479 states, "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property, . . . is a nuisance." Section 731 of the Code of Civil Procedure provides, "Any action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by a nuisance. . . ." That by virtue of the acts and omissions of "The Developer" it has violated these provisions, as well as §41700 (nuisance) and §41701 (visible emissions) of the California Health and Safety Code, and §§402 (nuisance) and 403 of the South Coast Air Quality Management District.

75. That Section 3482 of the Civil Code provides that "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." "The City's" decision to relocate the gate does not expressly or impliedly authorize the nuisance herein described. "The City" did not

sanction a nuisance for itself. "The Developer" does not have a governmental immunity for its use of its property that causes damages to others. "The Developer's" remedy was and is against "The City," but has no defense against these plaintiffs based on Section 3482 of the Civil Code.

76. That based on the facts hereinabove well pleaded, "The Developer" has caused and is causing a nuisance and continuing its negligence during the preparation of the site and the construction of the "Fairways Project;" and will be creating a continuing and permanent nuisance which will be maintained by its successor in title by permitting close to 1,500 vehicle trips a day that will come in and out of the access gate and on to Corte de la Vista every day across the street from the plaintiffs' property.

WHEREFORE, plaintiffs pray judgment against "The Developer" as follows:

A. That as to those parts of this cause of action that have not ripened (the continuing and permanent nuisance), the Court declare the respective rights and duties of the parties and their privity;

B. That upon notice, motion and points and authorities, the Court conduct a hearing to determine the legality of granting plaintiffs their right to file a Lis Pendens notice with the County Recorder in accordance with Code of Civil Procedure §§409-409.9;

C. A declaration of the rights and duties of the parties;

D. For general, special, and punitive damages in accordance with proof;

E. For reasonable attorneys', appraisal and engineering fees according to proof;

F. For costs of suit herein incurred; and

G. For such other and further relief as the Court may deem proper.

PLAINTIFFS REQUEST TRIAL BY JURY AND THAT THE JURY BE PERMITTED TO VIEW THE "P.I.O." AND THE PLAINTIFFS' PREMISES.

THIRD CAUSE OF ACTION
IN THE ALTERNATIVE
(Writ of Mandate)
(Plaintiffs vs. "The City" Defendant)

77. Plaintiffs incorporate paragraphs 1 through 6 both inclusive of their First Cause of Action as though fully set out here.

78. Under the authority and direction of the Subdivision Map Act (Government Code §§66410-66499.37) hereinafter for convenience referred to as "S.M.A.," the control of the design and improvements is vested in "The City" and it is required to enact a subdivision ordinance to supplement and implement the "S.M.A." which it did and is known as the "Subdivision Ordinance" (9417 §2 (part) 1975 and is contained in Title 20 of the Municipal Code).

79. Section 20.12.080 of the Subdivision Ordinance provides in part that the Planning Commission is authorized and directed to: "(1) Hold a public hearing on all tentative maps. Any interested person may appear at the hearing and shall be heard;" likewise, in Section 20.12.090 the City Council is required to: "(b) The City Council shall hold a public hearing on the tentative map. Any interested person may appear at such hearing and shall be heard."

80. The "S.M.A." provides in part that the control of the design and improvements is vested with the city and county governments with consideration for their relation to the adjoining areas and they are required to exercise discretion in determining relevant facts. The time within which to seek judicial review is extremely short and only a limited right to examine the reasonableness of their decision is provided for.

81. That pursuant to Section 20.12.092 of the Subdivision Ordinance, the plaintiffs received a notice for a meeting of the City Council on December 18, 1990, a copy of which is attached hereto and incorporated herein as Exhibit "C."

82. At said meeting employees of the Building, Engineering and Planning Department reviewed the background and the plans and specifications of "The Fairways Project."

The Assistant City Attorney also made comments and recommendations.

83. Employees and consultants of "The Developer" (Fieldstone Company) then put on a slick "dog and pony" demonstration, including, maps, photographs, and a slide presentation in support of the "Fairways Project."

84. That plaintiffs appeared at said meeting along with other interested parties and pursuant to the rules of "The City" were granted five minutes in which to speak as individuals and ten minutes for presentations on behalf of a group. A copy of the Agenda is attached hereto in support of this allegation as Exhibit "D."

85. That the plaintiff on his own behalf and also as the spokesperson for the Alicante Hills Homeowners Association, a California Corporation, voiced his objections to the Planning Department, the Planning Commission, as well as the City Council, to wit: The location of the access to the Project should be moved from Corte de la Vista back to Alicante Road where "The Developer" had originally requested it; that by placing the gate to the "Fairways Project" on Corte de la Vista, the City of Carlsbad has increased tenfold the probability that an accident would occur at the "blind spot" which exists when exiting Corte de la Vista on to Alicante Road; that the costs associated with compensating individuals for injuries incurred as a result of approval of the tentative map, with knowledge of such increased risks, will be unfairly born by the taxpayers of Carlsbad; and lastly, that plaintiffs' property value will decrease substantially due to the significant increase in noise, light, fumes, dust, dirt, and vibrations which will emanate from the 132 single family homes in and out of the planned unit development gate, the entrance being located below plaintiffs' property on Corte de la Vista, instead of Alicante Road. A copy of the Planning Commission's minutes of October 3, 1990 is attached hereto and incorporated herein by reference as Exhibit "E."

86. Thereafter, both "The Developer" and "The City" were given unlimited time, as they were in making their original presentation, to rebut the objections made by the public, including your plaintiffs. At no time was plaintiff given an

opportunity to cross-examine the witnesses who testified in favor of the plan. Nor was plaintiff allowed time to rebut the evidence which was marshaled in support of the plan.

87. On or about January 8, 1991, the tentative map was approved by the City of Carlsbad. However, the tentative map was subject to a number of conditions. In addition, the tentative map still had to comply with the final map requirements contained in Chapter 20.20 of the "City's" Subdivision Ordinance. Thereafter, without further notice or public hearings, the final map was approved by the City Council on or about September 3, 1991. This fact was discovered by plaintiffs on September 6, 1991, upon making inquiry with the Planning Department of "The City" as to the time limitation in which to seek judicial review of the City Council's decision. Plaintiffs were informed that the specific period of time in which to seek judicial review was not within the offhand knowledge of this particular employee, but that an investigation would be made and an answer provided as soon as possible. To date, plaintiffs have yet to hear from any employee at the Planning Commission as to the limited time in which to seek judicial review of the City Council's decision.

88. That the plaintiffs believe, and so state the facts to be, that in this case, the approval of the final subdivision map was not a mandatory act, and "The Developer" had no vested right and was subject to all the requirements of the "S.M.A." and "The City's" subdivision ordinance that was in force at the time of the approval of the tentative map, plus the express conditions of the said approval as set forth in plaintiffs' Exhibit E are such that they required the use of discretion, and thus this action was brought within ninety days of the approval of the final map.

89. Section 66499.37 of the S.M.A., setting the time limits in which to seek judicial review of a decision of the City Council, clearly does not distinguish between a decision approving a tentative map and one approving a final map. That in this case, the City Council does not have to approve the final map unless it is satisfied with the plan of subdivision. Furthermore, it could act other than to approve the final map. Accordingly, the approval of the final map by the City Council

was a decision for the purposes of Section 66499.37. Under these circumstances, "The City" was under a duty to give the plaintiffs notice and an opportunity to be heard but they failed to do either.

90. The dynamics of the relationship between "The City" and "The Developer" is such that even if the law was such that "The City" could not act other than to approve the final map, as a matter of fact they could withhold the approval for any reason or no reason at all. This is so because "The Developer" is the single largest owner of vacant real estate in the La Costa area of the City of Carlsbad and has one project after another in which they interface with "The City." Furthermore, unless the demand by "The City" is a clear overreaching and would be extremely costly to comply with by "The Developer," they would find time delays to seek injunctions or writs too costly to bear. Accordingly, "The Developer" is effectively under economic compulsion to "cooperate" with "The City;" unless they elect to fight the decision. Thus, the City Council can exercise discretion and disapprove a final map, even though it complies with the conditions of the tentative map. The Court should take judicial notice of these facts.

91. As to the hearings leading up to the approval of the tentative map, the plaintiffs admit to having received notice, but state that the notice was fatally defective for the following reasons:

(a) it failed to state that the decision on the tentative map was or could be the final decision on the application, and if judicial review was desired the objector had only 90 days within which to do so;

(b) it failed to state that the approval of the final map would be made without notice and without a hearing and that it would be, or could be, only a ministerial act and not subject to review;

(c) it failed to state that if they did not appeal the decision they may lose valuable property rights by virtue of the doctrines of res judicata and/or collateral estoppel.

92. At all times herein mentioned there was in full force and effect an ordinance of "The City" which provides, in

substance, that time limits for judicial review of any decision of "The City," made pursuant to Code of Civil Procedure § 1094.5, afford certain individuals "actual notice" of any decision affecting their rights. Said notice must state that, "Any petition or paper seeking judicial review must be filed in the appropriate court not later than the ninetieth day following the date on which the decision becomes final; . . ." (Chapter 1.16 §1.16.010).

93. That "The City" has a clear duty to advise a party to an adjudicatory proceeding of the time limit within which to seek judicial review of the decision in an action under Section 1094.5; all the more so they have a duty to plaintiffs who have substantial and significant property rights at risk by virtue of proceedings under their Subdivision Ordinance. The fact that a hearing leading up to a final decision has the unfortunate and misleading label of "tentative approval" of the map, further exasperates objectors and lulls them into a false sense of security, and "The City" is under an affirmative duty to furnish persons entitled to notice to explain that tentative is final and the consequences of that fact.

94. Neither the hearing nor the notice conform to the standards of the "due process" clause of the Federal or State Constitution. Therefore, the decision is null and void as to plaintiffs and should be set aside as being unconstitutional as applied to plaintiffs in this case.

95. The Subdivision Ordinance of "The City" as well as "S.M.A." is invalid and unenforceable on its face and as construed and as applied by "The City" as against the plaintiffs. It violates the due process clause and the equal protection clause of the United States Constitution as well as the California Constitution.

96. The hearings hereinabove identified were a sham and a fraud on the plaintiffs. "The City" knew or should have known that the notice and hearing provided was an abuse of authority and discretion. Substantial and significant property interests of the plaintiffs were involved and the notice given was not meaningful. In fact, the notice given by "The City" was false and misleading by failing to expressly notify plaintiffs of

the time limit within which to seek judicial review together with the disastrous consequences of res judicata and/or collateral estoppel for any cause of action the plaintiffs have or could have. The hearings did not permit discovery. They limited the individual to five minutes and group spokespersons to ten minutes. In addition, there was no right of cross-examination of witnesses who testified for "The City" or "The Developer." Furthermore, "The City" and "The Developer" were permitted to give their arguments and conclusions without any factual basis and without any time limitation. Lastly, plaintiffs were given no opportunity to rebut the testimony which was presented in support of the plan.

97. The Court is requested to take judicial notice that the City Council had discretion to determine the facts; that a hearing is required by law; that any interested person may appear at such hearing and shall be heard; and that evidence is required to be taken.

98. The plaintiffs have exhausted their administrative remedies and have no plain and speedy remedy in the ordinary course of the law other than that which this complaint provides.

99. That pursuant to Government Code § 1028.2 and/or Code of Civil Procedure §1028.5, the plaintiffs are requesting reasonable attorney's fees and expenses in addition to other ordinary and necessary costs incurred in this case as well as private attorney's general fees.

100. That based upon the above and foregoing, plaintiffs allege that a writ of mandate is necessary to protect the substantial rights of the plaintiffs and each of them and that substantial damages will be suffered by them if the request for the writ is denied. Such damages include the diminution in value and the loss of use and enjoyment of their property.

101. The first notice that the plaintiffs had as to the nature and extent of their damages occurred the first part of August 1991, when "The Developer," through its employees and agents, commenced grading and installing storm sewers on the property in question (P.I.Q.) with trucks, bulldozers, back hoes, earth movers and miscellaneous construction equipment, and used a driveway which is across the street and less than 100 feet

west of the named plaintiffs' property, for ingress and egress. This is a continuing nuisance and can be expected throughout construction and thereafter, when vehicles of all descriptions will (and at all hours of the day and night) be coming in and out to the 132 home subdivision.

102. That "The City" knew or should have known that plaintiffs believed that they had notice of all their rights; that the plaintiffs relied that "The City" had given them full notice of their rights, and have been damaged thereby. "The City" prevented the issues from being properly raised, and could not have been raised by the plaintiffs, who used reasonable diligence, and therefore are estopped from asserting the defense of failing to seek judicial review in a timely manner.

103. "The Developer" did not acquire a vested right upon the approval of the tentative map, they did not have a valid building permit nor perform substantial work and incur substantial liability in good faith reliance on the approval of the tentative map, and thus "The City" could have and should have held additional adjudicative, discretionary hearings subject to notice and an opportunity for plaintiffs to be heard, which they failed to do.

104. The Government Code provides the "The Developer" with a statutory equivalent of a vested right; principal among these are the Development Agreement, §§65864-65869.5, and the Vesting Map Act, §§66498.1 - 66498.9. "The Developer" did not avail itself of this protection.

105. Government Code §66468 provides that the filing for record of the final map shall automatically and finally determine the validity of such map. The final map in this case was not filed until December 20, 1991, as document number 1991-0662811, two full months after plaintiffs' suit was on file.

106. Chapter 4, Article 1 of the "S.M.A." provides the requirements for approval of a subdivision. § 66473 provides that a map shall be disapproved for failure to meet the requirements of the "S.M.A." or the local ordinance. The only qualification being that ". . . a final map shall be disapproved only for failure to meet or perform requirements or conditions

which were applicable to the subdivision at the time of the approval of the tentative map . . ."

107. Further, §66474 provides in part that a map shall be denied if the design or improvement of the proposed subdivision: (a) is not consistent with the general and specific plans of the community, or (b) is likely to cause substantial environmental damage.

108. The facts alleged in this complaint support the allegations of the creation of a nuisance, trespass, and air pollution, thus was not consistent with the general and specific plans of the community and is and will cause substantial environmental damage.

109. That the plaintiffs received no notice and no opportunity to a hearing of the proceedings leading up to the approval of the final map which was, or ought to have been, an adjudicative, discretionary hearing.

110. The plaintiffs filed their complaint within forty-five days from the approval of the final map (and within two and a half months from the commencement of the site preparation) and are entitled to judicial review.

111. As hereinabove alleged, Title 1, § 1.16.010 of the City of Carlsbad Municipal Code provides for time limits for judicial review. It provides in substance that upon making a final decision, "The City" shall provide notice to the party the time within which judicial review must be sought as part of the decision. No such notice was given by "The City" to these plaintiffs.

112. §1.16.020 of said Title, though not applicable to these plaintiffs, bars court action to " . . . attack, review, set aside, void, annul or seek damages or compensation for any city decision . . ." (emphasis added). Government Code §66499.37 which bars court action does not bar actions which only "seek damages or compensation."

113. That the plaintiffs allege upon information and belief and based thereon state the facts to be that they have sought judicial revision within 90 days of September 3, 1991, approving the final map and that decision was the final and appealable order.

114. That plaintiffs allege upon information and belief and based thereon state the facts to be that: They were not parties nor in privity with the parties in the proceeding below; §66499.37 of "S.M.A." is not applicable to an action for compensation.

115. Government Code §66499.37 only applies to an action to attack the decision of the public agency involved. Count I of this complaint only seeks compensation because of the damages and taking caused by the decision to relocate the gate.

116. In this count, plaintiffs do not seek a writ of mandate unless the court finds that the approval of the final map was the final and appealable order or that the proceedings were unconstitutional and null and void.

117. That in the event that the court finds that the complaint was filed in a timely manner, the plaintiffs allege and state the facts to be that the decision to relocate the gate based on public safety, did not advance the legitimate governmental interest because the fact is that it created a greater danger for the public and was counter-productive and did not substantially advance a legitimate governmental interest.

118. The plaintiffs believe and state the facts to be that "The City's" decision was improvident and flawed, and there is a greater danger of injuries and fatalities by increasing the traffic that exits from Corte de la Vista because it is a "blind" exit to northbound traffic going north and constitutes a negligent design of traffic management.

WHEREFORE, plaintiffs pray for a judgment against "The City" as follows (if they do not voluntarily relocate the access to the "Fairways Project" to Alicante Road as originally designated by "The Developer"):

A. Make findings of fact and conclusions of law and enter judgment thereon that the plaintiffs were not parties nor in privity with the parties relating to the "decision" of "The City" to locate the access to the "Fairways Project" on Corte de la Vista;

B. Make findings of fact and conclusions of law and enter judgment thereon that § 66499.37 of the "S.M.A." is not

applicable to bar plaintiffs from an action or actions for compensation;

C. Make findings of fact and conclusions of law and enter judgment thereon that "The City" is estopped from defending plaintiffs' action for just compensation on the basis of failing to seek judicial review in a timely manner;

D. Make findings of fact and conclusions of law that the proceeding resulting in "The City's" decision to relocate the access to the "Fairways Project" was in violation of the plaintiffs' due process and equal protection rights under both the federal Constitution and the State of California Constitution;

E. Make findings of fact and conclusions of law that the Subdivision Ordinance and "S.M.A." statute are both unconstitutional on their face and as applied to plaintiffs.

F. For a supplemental hearing re attorney fees and costs, including the cost of the record in the proceeding before "The City" if necessary, and attorneys' fees for services as a private Attorney General;

G. For such other and further relief as may be meet and proper in the premises.

Dated: May 22, 1992

THOMAS A. MASS
Plaintiff In Pro Per

JANET A. MASS
Plaintiff In Pro Per

VERIFICATION

I, THOMAS A. MASS, am one of the plaintiffs in the above-entitled action. I have read the foregoing SECOND AMENDED COMPLAINT FOR INVERSE CONDEMNATION AND NUISANCE REQUESTING DECLARATORY RELIEF AND IN THE ALTERNATIVE A WRIT OF MANDATE, and know the contents thereof. The same is true of my own knowledge except as to those matters which are therein alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Executed at Carlsbad, California, this 22nd day of May, 1992.

THOMAS A. MASS
2851 Torry Court
Carlsbad, CA 92009
Phone: (619) 931-0100
FAX: (619) 438-7850

PLAINTIFFS DEMAND TRIAL BY JURY

PROOF OF SERVICE OMITTED IN PRINTING

From the Desk of
THOMAS A. MASS

7 August 1991

The Villages of La Costa
P.O. Box 9000-266
Carlsbad, CA 92009

Attention: Mrs. Bradstreet

Re: Fieldstone Company's Fairways Project

Dear Neighbor:

I have been meaning to go on record with you as to my objections to your project, The Fairways. This a.m. at 4:30 your grading contractor started unloading its heavy duty equipment and it sounded like "operation Fairway storm." This "serenade" under our bedroom window provided me with the motivation to get this letter off without delay.

As you know, Courte de La Vista "T's" into Alicante Road, and this exit is blind to traffic coming up the hill. Because of the tenforld increase in traffic, it's reasonable to expect an accident and all the tragic things that will result. Therefore, I urge you not to plac eyour entrance on Courte de La Vista, but rather, on Alicante Road.

The entrance of Courte de La Vista also adversely affects the residential nature of the street we front on; we can expect noise, fumes, flashing headlights in our homes, etc., which were designed to capitalize on the tranquil view and fresh air. You have made a residential low use road into a high traffic artery.

EXHIBIT A

You have shown no sensitivity for the safety or aesthetics of our community. In mitigation, you should minimize these assaults on our environment by such steps as" low one-story homes at the high entryway; install glass walls on the homes that front on Courte de La Vista between Alicante Road and the entryway; speed and quiet zone signs; and appropriate landscaping.

Your future conduct will show your intentions.

Very truly yours,
THOMAS A. MASS

TAM/ds

PLAINTIFFS' GROUP EXHIBIT B

1. From balcony looking down at terrace towards the S.W.
2. From balcony looking down at terrace toward the S.E.
3. From balcony looking toward the S.E.
4. From balcony looking toward the S.E. and Barbecue
5. Balcony off of master bedroom suite looke E.
6. Terrace from E. side looking S.
7. Terrace from W. side looking S.E.
8. Terrace from N.W. corner looking to S.E. corner.
9. Terrace from N.E. corner looking to S.W. corner.
10. Terrace from E. side looking toward the W.
11. Terrace fromhe S.E. corner looking N.W.
12. Steam table, grill, sink, and refrigerator in entertainment center.
13. Terrace from entertainment center to the spa.
14. From entertainment center to house off of living room.
15. Panorama looking W.S.W.
16. Panorama looking S.W.
17. Panorama looking S.

EXHIBIT B

18. Panorama looking S.S.E.

19. Panorama looking S.E.

20. Panorama looking E.

All photographs in plaintiff's group exhibit were taken by Thomas A. Mass on the 28th day of September 1991. The directions indicated above are only approximate and relative. The photographs (B1 to B20 are a true representation of what they purport to show.

NOTICE OF PUBLIC HEARING
CT 90-23/PUD 90-23/HDP 90-29

NOTICE IS HEREBY GIVEN that the City Council of the City of Carlsbad will hold a public hearing at the City Council Chambers, 1200 Carlsbad Village Drive (formerly Elm Avenue), Carlsbad, California, at 6:00 P.M., on Tuesday, December 18, 1990, to consider an application for a tentative map, planned unit development and hillside development permit for 132 single family detached homes on 41.09 acres of land in the RDM zone and Local Facilities Mnagement Zone 6 on property generally located south of Corte de la Vista, east of Alicante Road and north of the La Costa Gold Course and more particularly described as:

> Parcel 2 of Parcel Map No. 11722, in the City of Carlsbad, County of San Diego, according to map thereof filed in e office of the County Recorder of San Diego County on October 10, 1981 as file no. 81-322184 of Official Records.

If you have any questions regarding this matter, please call the Planning Department at 438-1161.

If you challenge the Tentative Tract Map/Planned Unit Development/Hillside Development Permit in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice or in written correspondence delivered to the City of Carlsbad City Clerk's Office at or prior to the public hearing.

APPLICANT: Fieldstone Company
PUBLISH: December 6, 1990
CARLSBAD CITY COUNCIL

MAP OMITTED IN PRINTING

EXHIBIT C

CITY OF CARLSBAD
CITY COUNCIL MEETING
CARLSBAD MUNICIPAL WATER DISTRICT MEETING
HOUSING AND REDEVELOPMENT COMMISSION MEETING

AGENDA
DECEMBER 18, 1990

NOTICE TO THE PUBLIC

1. Citizens may have an item listed on the agenda by sumbitting a letter to the City Manager ten (10) days prior to the meeting.

2. It is Council's policy to adjourn meetings no later than 10:00 P.M.

3. Meetings are divided into categories shown below.

4. When you are called to speak, please come forward and state your name and address.

CONSENT CALENDAR: If you desire to talk about an item on the Consent Calendar, a written **"Request to Speak"** form must be filed with the City Clerk prior to the time the Consent Calendar is called. The items listed under Consent Calendar are considered routine and will be enacted by one motion as listed. There will be no separate discussion on these items prior to the bote, unless an item is removed.

PUBLIC COMMENT: If you desire to speak about an item not listed on the agenda, a pink **"Time Reservation Request"** form should be filed with the City Clerk. A total of 15 minutes is provided for the Public Comment portion of the Agenda. Speakers are limited to three (3) minutes each.

EXHIBIT D

In conformance with the Brown Act, no action can occur on items presented during Public Comment.

PUBLIC HEARINGS: It is not necessary to file a request to speak on items listed on this agend as Public Hearings.

ALL OTHER CATEGORIES: For all other agenda items a **"Request to Speak"** form must be filed with the City Clerk before the item is announced. There is a five (5) minute time limit for individual speakers.

MINUTES

Meeting of:	PLANNING COMMISSION
Time of Meeting:	6:00 p.m.
Date of Meeting:	October 3, 1990
Place of Meeting:	City Council Chambers

MINUTES OMITTED IN PRINTING, EXCEPT PAGE 2, PARAGRAPH 3:

> "The project is proposed as a gated community. The gate design is single access off Corte de la Vista and it provides a turnaround area at the entrance. The location of the single access was dictated by staff. The original proposal came in with an access off Alicante Road; however, for traffic safety purposes, staff requested that the entrance be moved to Corte de la Vista."

EXHIBIT E

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

THOMAS A. MASS and JANET A. MASS, Plaintiffs

v.

CITY OF CARLSBAD, a Municipal Corporation; FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP, a California Limited Partnership, Defendants

Case No. N53303

THIRD AMENDED COMPLAINT FOR PLAINTIFFS' THIRD CAUSE OF ACTION FOR A WRIT OF MANDATE IN THE ALTERNATIVE.

PLAINTIFFS RESPECTFULLY REPRESENT:

Procedural Perspective

On July 27, 1992 this Court entered an order sustaining defendants' demurrer to plaintiffs' second amended complaint in its entirety. Plaintiffs' First Cause of Action for inverse condemnation against "The City," and their Second Cause of Action based on nuisance/negligence against "The Developer" were sustained without leave to amend. As to the plaintiffs' Third Cause of Action which was in the alternative requesting a Writ of Mandate against "The City," the Court granted plaintiffs ten days in which to amend.

Procedural Prospective

This third cause of action is based on only one set of facts and alternative theories of recovery. Primary among them is an action for deprivation of constitutional rights under color of state law, brought pursuant to the federal Civil Rights Act, Title 42 U.S.C. §1983, providing remedies for the defendants' deprivation of plaintiffs' civil rights. The facts set forth hereinafter would also support recovery on the basis of

California common law, and statutory law, as well as by the Fourteenth Amendment guaranty of due process of law clause of the federal Constitution and Article I, §7 of the California Constitution both of which require a meaningful notice and a fair trial before an individual can be deprived by the government of a fundamental interest, including their interest in real estate. By this action plaintiffs seek all legal and equitable relief to which they may be entitled to as redress, including, but not limited to, compensatory, declaratory and injunctive relief as well as attorney's fees and costs, and prejudgment interest.

Stating separate causes of action for each of the various theories available would not aid the parties nor the Court, but would complicate the plaintiffs' third cause of action, would be redundant, and not serve the purposes for which separate theories of recovery require that they be set forth in separate causes of action.

THIRD CAUSE OF ACTION

Writ of Mandate
(In The Alternative)
(Plaintiffs vs. "The City" Defendant)

1. Plaintiffs are citizens of the United States and are the owners and reside in the following described real property in the city of Carlsbad, San Diego County, California:

> Lot 26 of Carlsbad Tract No. 81-29 in the City of Carlsbad, County of San Diego, State of California, according to Map thereof No. 11423, filed in the Office of the County Recorder of San Diego, January 20, 1986, and commonly known as 2851 Torry Court.

2. The above described property is contiguous to said Torry Court on the north and Corte de la Vista on the south and is within a gated community known as Alicante Hills and is bounded on the east by Bolero Street and on the west by Alicante Road.

3. The plaintiffs' home is a free standing single family residence with a 35' x 50' terrace on the ground floor, and a 10' x 40' balcony on the second floor which fronts on said Corte de la Vista.

4. Said terrace and balcony afford a 180` panoramic view overlooking the La Costa Golf Course and a direct and unobstructed forever view of the Batiquitos Lagoon and the Pacific Ocean, as well as the year round prevailing ocean breeze which is the property's unique and primary use and value.

5. The plaintiffs' property is contiguous to the "Fairways Project" of the defendant Fieldstone/La Costa Associates Limited Partnership ("The Developer"), which is a planned development of 132 single family detached residences located south of Corte de la Vista, east of Alicante Road and north of the La Costa Golf Course and west of San Marcos Creek.

6. The defendant City of Carlsbad is a public entity chartered and existing under the laws of the State of California ("The City").

7. Alicante Road is a heavily traveled secondary road with a turn lane in the median; on August 23, 1984, "The City" barricaded Alfil Way at the western side of San Marcos Creek and created a cul de sac at the barricade and thereby blocked through traffic to La Costa Avenue. This street later was renamed Corte de la Vista (court of view) and was a little used non-through traffic residential street, not much longer than a quarter of a mile (for a map of the area see plaintiffs' Exhibit "C").

8. Plaintiffs' predecessor in title, to capitalize on the environment created by "The City," obtained from "The City" the necessary approval to carve out of the hillside above the new Corte de la Vista a plateau for a stable and suitable site to build a corridor of thirty-eight homes. The spectacular panoramic view afforded by this location was appropriately reflected in the price of the homes.

9. The plaintiffs' developer obtained title to this tract of land from "The Developer's" predecessor in title who subjected the remainder to height restrictions.

10. The plaintiffs confirmed this fact, as well as the fact that the original plan and map for the "Fairways Project" located the access to the proposed project on Alicante Road, and in reliance thereon purchased their residence as aforesaid.

11. The reason why the plaintiffs paid a premium for their location and further enhanced their terrace with a Bar-B-Q, spa and full landscaping, is because they use and enjoy the facilities for year round outdoor living for their leisure and recreation. Further, the location permitted their home to be cooled by fresh, clean air from the ocean, making air conditioning unnecessary. This factor was important to them for reasons of health and comfort and because they cannot tolerate air conditioning.

12. Under the authority and direction of the Subdivision Map Act (Government Code §§66410-66499.37) hereinafter for convenience referred to as "S.M.A.," the control of the design and improvements is vested in "The City" and it is required to enact a subdivision ordinance to supplement and implement the "S.M.A." which it did and is known as the "Subdivision Ordinance" (9417 §2 (part) 1975 and is contained in Title 20 of the Municipal Code).

13. That pursuant to said statute and ordinance "The Developer" applied to "The City" for the approval of a planned unit development, hillside development, and a subdivision map (CT90-23/PUD 90-23/HDP 90-29), and the issuance of the related permits (map).

14. Section 20.12.080 of the Subdivision Ordinance provides in part that the Planning Commission is authorized and directed to: "(1) Hold a public hearing on all tentative maps. Any interested person may appear at the hearing and shall be heard;" likewise, Section 20.12.090 states: "(b) The City Council shall hold a public hearing on the tentative map. Any interested person may appear at such hearing and shall be heard."

15. The "S.M.A." provides in part that the control of the design and improvements is vested with the city government with consideration for their relation to the adjoining areas and they are required to exercise discretion in determining relevant facts. The time within which to seek judicial review is extremely

short and only a limited right to examine the reasonableness of their decision is provided for.

16. That pursuant to Section 20.12.092 of the Subdivision Ordinance, the plaintiffs received a notice for a meeting of the City Council on December 18, 1990, a copy of which is attached hereto and incorporated herein as Exhibit "C."

17. "The Developer's" original plan and map and its application to "The City" requested that the location of the access to the project should be on Alicante Road. "The City" denied the request and insisted that the access be moved to Corte de la Vista as a condition for the issuance of the necessary approval. An employee of the Planning Department of "The City" testified before the Planning Commission of "The City" at their meeting of October 3, 1990, in part as follows:

> "The project is proposed as a gated community. The gate design is single access off Corte de la Vista and it provides a turnaround area at the entrance. The location of the single access was dictated by staff. The original proposal came in with an access off Alicante Road; however, for traffic safety purposes, staff requested that the entrance be moved to Corte de la Vista." (See page 2 of plaintiffs' group Exhibit "E.")

18. At the meeting before the City Council on December 18, 1990, employees of the Building, Engineering and Planning Department reviewed the background and the plans and specifications of "The Fairways Project." The Assistant City Attorney also made comments and recommendations.

19. Employees and consultants of "The Developer" (Fieldstone Company) then put on a slick "dog and pony" demonstration, including, maps, photographs, and a slide presentation in support of the "Fairways Project."

20. That plaintiffs appeared at said meeting along with other interested parties and pursuant to the rules of "The City" were granted five minutes in which to speak as individuals and ten minutes for presentations on behalf of a group. A copy of

the Agenda is attached hereto in support of this allegation as Exhibit "D." That the procedures are designed and applied merely to evoke and record a public response and the process does not guarantee an affected landowner a meaningful predeprivation hearing. There is no opportunity to present a case and, at best, you may identify your points. There is no pretense that you can present evidence in support of your case nor even an opportunity to persuade. The failure of a meaningful notice coupled with this type of hearing is a sham.

21. That the plaintiff on his own behalf and also as the spokesperson for the Alicante Hills Homeowners Association, a California Corporation, voiced his objections to the Planning Department, the Planning Commission, as well as the City Council, to wit: The location of the access to the Project should be moved from Corte de la Vista back to Alicante Road where "The Developer" had originally requested it; that by diverting the traffic from Alicante Road to Corte de la Vista, the City of Carlsbad has increased tenfold the probability that an accident would occur at the "blind spot" which exists when exiting Corte de la Vista on to Alicante Road; that the costs associated with compensating individuals for injuries incurred as a result of approval of the tentative map, with knowledge of such increased risks, will be unfairly born by the taxpayers of Carlsbad; and lastly, that plaintiffs will be denied the use and enjoyment of their property and the property value will decrease substantially due to the significant increase in noise, light, fumes, dust, dirt, and vibrations which will emanate from the traffic generated by the 132 single family homes in and out of the planned unit development gate, the entrance being located below plaintiffs' property on Corte de la Vista, instead of Alicante Road. A copy of the Planning Commission's minutes of October 3, 1990 is attached hereto and incorporated herein by reference as Exhibit "E."

22. Thereafter, both "The Developer" and "The City" were given unlimited time, as they were in making their original presentation, to rebut the objections made by the public, including your plaintiffs. At no time was plaintiff given an opportunity to cross-examine the witnesses who testified in favor

of the plan. Nor was plaintiff allowed time to rebut the evidence which was marshaled in support of the plan.

23. On or about January 8, 1991, the tentative map was approved by the City of Carlsbad. However, the tentative map was subject to a number of conditions. That these conditions involve issues the resolution of which require the exercise of judgment, discretion, and the careful balancing of conflicting interests which is the essence of the "adjudicative" process. In addition, the tentative map still had to comply with the final map requirements contained in Chapter 20.20 of the "City's" Subdivision Ordinance, which also calls for the adjudicative process.

24. This notwithstanding, without further notice or public hearings, the final map was approved by the City Council on or about September 3, 1991. This fact was discovered by plaintiffs on September 6, 1991, upon making inquiry with the Planning Department of "The City" as to the time limitation in which to seek judicial review of the City Council's decision. Plaintiffs were informed that the specific period of time in which to seek judicial review was not within the offhand knowledge of this particular employee (nor did he or the plaintiffs know that the time was to be computed from the approval of the tentative map), but that an investigation would be made and an answer provided as soon as possible. To date, plaintiffs have yet to hear from any employee at the Planning Commission as to the limited time in which to seek judicial review of the City Council's decision. At no time did "The City" advise plaintiffs that the time to appeal is calculated from the date the "tentative" map is approved, but to the contrary, led plaintiffs to believe that the approval of the final map was the final and appealable order.

25. That the plaintiffs believe, and so state the facts to be, that in this case, the approval of the final subdivision map was not a mandatory act, and "The Developer" had no vested right and was subject to all the requirements of the "S.M.A." and "The City's" subdivision ordinance that was in force at the time of the approval of the tentative map, plus the express conditions of the said approval as set forth in plaintiffs' Exhibit "E" are such that they required the use of discretion, and thus this action was

brought within ninety days of the adjudicative hearing and the decision approving the final map.

26. Section 66499.37 of the S.M.A., setting the time limits in which to seek judicial review of a decision of the City Council, clearly does not distinguish between a decision approving a tentative map and one approving a final map. That in this case, the City Council does not have to approve the final map unless it is satisfied with the plan of subdivision. Furthermore, it could act other than to approve the final map. Accordingly, the approval of the final map by the City Council was a decision for the purposes of Section 66499.37. Under these circumstances, "The City" was under a duty to give the plaintiffs notice and an opportunity to be heard but they failed to do either.

27. The dynamics of the relationship between "The City" and "The Developer" is such that even if the law stated that "The City" could not act other than to approve the final map, as a practical matter and as a matter of fact, they could withhold the approval for any reason or no reason at all. This is so because "The Developer" is the single largest owner of vacant real estate in the La Costa area of the City of Carlsbad and has one project after another in which they interface with "The City." Furthermore, unless the demand by "The City" was a clear overreaching or would be too costly for "The Developer" to comply with, they would find time delays to seek injunctions or writs too costly to bear. Accordingly, "The Developer" is effectively under economic compulsion to "cooperate" with "The City." Thus, the City Council can exercise its discretion and disapprove a final map, even though "The Developer" complies with the conditions of the tentative map. The Court should take judicial notice of these facts.

28. As to the hearings leading up to the approval of the tentative map, the plaintiffs admit to having received "notice," but state that the "notice" was fatally defective for the following reasons:

(a) it failed to state that the decision on the tentative map was or could be the final decision on the application, and if

judicial review was desired the objector had only 90 days within which to do so;

(b) it failed to state that the approval of the final map would be made without notice and without a hearing and that it would be, or could be, only a ministerial act and not subject to review;

(c) it failed to state that if plaintiffs did not appeal the decision they may lose valuable property rights by virtue of the doctrines of res judicata and/or collateral estoppel and the statute of limitations.

29. At all times herein mentioned there was in full force and effect an ordinance of "The City" which provides, in substance, that time limits for judicial review of any decision of "The City," made pursuant to Code of Civil Procedure §1094.5, afford certain individuals "actual notice" of any decision affecting their rights. Said notice must state that, "Any petition or paper seeking judicial review must be filed in the appropriate court not later than the ninetieth day following the date on which the decision becomes final;..." (Chapter 1.16 §1.16.010).

30. That "The City" has a clear duty to advise a party to an adjudicatory proceeding of the time limit within which to seek judicial review of the decision in an action under Section 1094.5; all the more so they have a duty to plaintiffs who have substantial and significant property rights at risk by virtue of proceedings under their Subdivision Ordinance. The fact that a hearing leading up to a final decision has the unfortunate and misleading label of "tentative approval" of the map, further exasperates objectors and lulls them into a false sense of security, and "The City" is under an affirmative duty to furnish persons with notice to explain that tentative action may be final and the consequences of that fact, which they failed to do.

31. Neither the hearing nor the notice conform to the standards of the "due process" clause of the Federal or State Constitution. Therefore, the decision is null and void as to plaintiffs and should be set aside as being unconstitutional as applied to plaintiffs in this case.

32. The Subdivision Ordinance of "The City" as well as "S.M.A." is invalid and unenforceable on its face and as

construed and as applied by "The City" as against the plaintiffs. It violates the due process clause and the equal protection clause of the United States Constitution as well as the California Constitution.

33. The hearings hereinabove identified were a sham and a fraud on the plaintiffs. "The City" knew or should have known that the notice and hearing provided was an abuse of authority and discretion. Substantial and significant property interests of the plaintiffs were involved and the notice given was not meaningful and was fatally defective. In fact, the notice given by "The City" was false and misleading by failing to expressly notify plaintiffs of the time limit within which to seek judicial review together with the disastrous consequences of res judicata and/or collateral estoppel and the statute of limitations for any cause of action the plaintiffs have or could have. The hearings did not permit discovery. They limited the individual to five minutes and group spokespersons to ten minutes. In addition, there was no right of cross-examination of witnesses who testified for "The City" or "The Developer." Furthermore, "The City" and "The Developer" were permitted to give their arguments and conclusions without any factual basis and without any time limitation. Lastly, plaintiffs were given no opportunity to rebut the testimony which was presented in support of the plan.

34. The Court is requested to take judicial notice that the City Council had discretion to determine the facts; that a hearing is required by law; that any interested person may appear at such hearing and shall be heard; and that evidence is required to be taken (none of which occurred in this case).

35. The plaintiffs have exhausted their administrative remedies and have no plain and speedy remedy in the ordinary course of the law other than that which this complaint provides.

36. That pursuant to Government Code §1028.2 and/or Code of Civil Procedure §1028.5, the plaintiffs are requesting reasonable attorney's fees and expenses in addition to other ordinary and necessary costs incurred in this case as well as private attorney's general fees.

37. That based upon the above and foregoing, plaintiffs allege that a writ of mandate is necessary to protect the substantial rights of the plaintiffs and each of them and that substantial damages will be suffered by them if the request for the writ is denied. Such damages include the diminution in value and the loss of use and enjoyment of their property and is in excess of $100,000.00.

38. The first notice that the plaintiffs had as to the nature and extent of their damages occurred the first part of August 1991, when "The Developer," through its employees and agents, commenced grading and installing storm sewers on the property in question (P.I.Q.) with trucks, bulldozers, back hoes, earth movers and miscellaneous construction equipment, and used a driveway which is across the street and less than 100 feet west of the named plaintiffs' property, for ingress and egress. (Plaintiffs' Exhibit "A.") This is a continuing nuisance and can be expected throughout construction which is expected to take several years, and thereafter, when vehicles of all descriptions will (and at all hours of the day and night) be coming in and out of the 132 home subdivision.

39. That "The City" knew or should have known (because they led them to believe), that plaintiffs were lulled into believing that they had been given notice of all their rights; that the plaintiffs relied on "The City" to give them a meaningful notice, "The City" misplaced that trust and reliance, and plaintiffs have been damaged thereby. "The City" prevented the issues from being properly raised, and the issues could not have been raised by the plaintiffs, who used reasonable diligence, and therefore "The City" is estopped from asserting the defense of failing to seek judicial review in a timely manner.

40. "The Developer" did not acquire a vested right upon the approval of the tentative map, they did not have a valid building permit nor did they perform substantial work and incur substantial liability in good faith reliance on the approval of the tentative map, and thus "The City" could have and should have held additional adjudicative, discretionary hearings prior to their decision approving the final map subject to notice and an opportunity for plaintiffs to be heard, which they failed to do.

41. The Government Code provides the "The Developer" with a statutory equivalent of a vested right; principal among these are the Development Agreement, §§65864-65869.5, and the Vesting Map Act, §§66498.1 - 66498.9. "The Developer" did not avail itself of this protection.

42. Government Code §66468 provides that the filing for record of the final map shall automatically and finally determine the validity of such map. The final map in this case was not filed until December 20, 1991, as document number 1991-0662811, two full months after plaintiffs' suit was filed.

43. Chapter 4, Article 1 of the "S.M.A." provides the requirements for approval of a subdivision. §66473 provides that a map shall be disapproved for failure to meet the requirements of the "S.M.A." or the local ordinance. The only qualification being that ". . . a final map shall be disapproved only for failure to meet or perform requirements or conditions which were applicable to the subdivision at the time of the approval of the tentative map . . ." The requirements were not met and are not to this day.

44. Further, §66474 provides in part that a map shall be denied if the design or improvement of the proposed subdivision: (a) is not consistent with the general and specific plans of the community, or (b) is likely to cause substantial environmental damage.

45. The facts alleged in this complaint support the allegations of the creation of a nuisance, trespass, and air pollution, thus the approval of a final map, could not be consistent with the general and specific plans of the community and is and will continue to cause substantial environmental damage.

46. That the plaintiffs received no notice and no opportunity to a hearing of the proceedings leading up to the approval of the final map which was, or ought to have been, an adjudicative, discretionary hearing.

47. The plaintiffs filed their complaint within forty-five days from the approval of the final map (and within two and a half months from the commencement of the site preparation) and are entitled to judicial review.

48. As hereinabove alleged, Title 1, §1.16.010 of the City of Carlsbad Municipal Code provides for time limits for judicial review. It provides in substance that upon making a final decision, "The City" shall provide notice to the party stating the time within which judicial review must be sought as part of the decision. No such notice was given by "The City" to these plaintiffs. Because of the special relationship between "The City" and the plaintiffs as citizens, they had a duty to give plaintiffs a proper notice and a meaningful hearing and they breached that duty.

49. §1.16.020 of said Title, though not applicable to these plaintiffs, bars court action to " . . . attack, review, set aside, void, annul or seek damages or compensation for any city decision..." (emphasis added). Government Code §66499.37 which bars court action does not bar actions which only "seek damages or compensation," and demonstrates how easy it is to bar attacks and as well as compensatory damages, and "The City" used this device and is charged with actual notice of the distinction between Government Code §66499.37 which does not bar actions for compensatory damages.

50. That the plaintiffs allege upon information and belief and based thereon state the facts to be that they have sought judicial review within 90 days of September 3, 1991, the date of approval of the final map and that such decision was the final and appealable order.

51. That plaintiffs allege upon information and belief and based thereon state the facts to be that: They were not parties nor in privity with the parties in the proceeding below; §66499.37 of "S.M.A." is not applicable to an action for compensation or damages.

52. Government Code §66499.37 only applies to an action to attack the decision of the public agency involved. Count I of this complaint only seeks compensation because of the damages and/or taking caused by the decision to divert the traffic.

53. In this count, plaintiffs do not seek a writ of mandate unless the court finds that the approval of the final map was the final and appealable order. In the plaintiffs' claim of the denial of both procedural and substantive due process and their civil

rights, the writ of mandate cause of action is used as a judicial vehicle so the Court can examine the proceedings leading to the decisions approving the tentative and final maps. It does not challenge the decisions (which under the law do not exist), but only challenges the acts and omissions which were antecedent or retroactive to the "decisions."

54. That in the event that the court finds that the complaint was filed in a timely manner, the plaintiffs allege and state the facts to be that the decision to divert traffic based on public safety, did not advance the legitimate governmental interest because the fact is that it created a dangerous condition on public property and was counter-productive and did not substantially advance a legitimate governmental interest.

55. The plaintiffs believe and state the facts to be that "The City's" decision was improvident and flawed, and there is a greater danger of injuries and fatalities by increasing the traffic that exits from Corte de la Vista because it is a "blind" exit to northbound traffic and constitutes a negligent design of traffic management and creates a dangerous condition on public property.

56. That notwithstanding that "The City" had a common law duty, a state statutory duty, a federal statutory duty (Federal Civil Rights Act, 42 U.S.C. §1983), and a constitutional duty also, both state and federal, to afford plaintiffs procedural and substantive due process and equal protection, they failed and neglected to provide the plaintiffs the necessary protection they were entitled to and as a consequence and proximate cause thereof, plaintiffs have been damaged as herein alleged. The denial of their civil rights has resulted in the denial of their property rights which is the measure of damages plaintiffs seek.

57. "The City," by diverting the traffic for the "Fairway Project" from Alicante Road to Corte de la Vista, violated §66474 of the "S.M.A." which provides that a map shall be denied approval if the design or improvement of the proposed subdivision: (a) is not consistent with the general and specific plans of the community, or (b) is likely to cause substantial environmental damage.

58. §66474 of the "S.M.A." was in full force and effect at the time the tentative map was approved and was applicable then as well as at the time the final map was approved. By denying the plaintiffs proper notice and a meaningful hearing to the proceeding leading up to the approval of the tentative map, and no notice or hearing at all as to the approval of the final map, "The City" breached its duty to the plaintiffs and is responsible to the plaintiffs for their damages which were proximately caused by their aforesaid acts and omissions.

59. That as a direct and necessary result of the official governmental action of diverting the traffic to this 132 home development from Alicante Road to Corte de la Vista with the only entrance located across the street from the plaintiffs' home, the aforesaid noise, dirt, odor, air pollution, flashing headlights and vibrations are, and will continue to cause, a substantial interference with the use and enjoyment by plaintiffs of plaintiffs' homes, the loss of reasonable investment-backed expectations, and a diminution in its primary use and value inasmuch as the volume of traffic will increase more than tenfold to approximately 1500 vehicular sorties a day, all focused across the street from plaintiffs' residence.

60. As a direct result and as a proximate consequence of the dust, dirt, debris, noxious odors, flashing lights and noise, the plaintiffs have been and will continue to be peculiarly and substantially damaged. That "The City," by diverting the traffic to the "Fairways Project" across the street from the plaintiffs' homes, has caused an invasion and appropriation of their valuable property rights and their investment-backed expectations, which has rendered their property untenantable to the plaintiffs, being the essence of why they purchased the property for their residence and paid a premium for its location and view and constitutes a loss of its primary use and value and thus is a compensable taking under Article I, Section 19 of the California Constitution, as well as the Fifth and Fourteenth Amendment of the federal Constitution.

61. That based upon the factual allegations herein, the plaintiffs state the facts to be and allege as follows:

(a) That the nuisance-trespass type activity that results from the traffic generated has caused a diminution in the value of the plaintiffs' property and has substantially interfered with their use and enjoyment of their home by imposing on them a direct, peculiar and substantial burden, and as such, they are entitled to just compensation as a result of the taking and/or damaging of their property;

(b) That the air pollution caused by the traffic is effective physical appropriation, occupation or interference of a permanent nature by contaminating the air over their property, with toxic and non-toxic gaseous solids and/or liquids, and constitutes a compensable taking or damage and that this is true whether the diversion of traffic achieved an important public benefit or had only a minimal economic impact on the plaintiffs;

(c) That even if the effects of the diversion of traffic to across from plaintiffs' property was not a possessory type of activity as hereinabove alleged and only constitutes a non-possessory type interference, the extent to which "The City's" decision has damaged or destroyed the plaintiffs' distinct investment-backed expectations, as hereinabove alleged, are compensable, and the plaintiffs are entitled to just compensation.

(d) That the view and the prevailing ocean breeze were not the primary reasons why the plaintiffs purchased their home and improved the terrace at an additional cost of $50,000.00. They were the only reasons! The view and the breeze is still present, but because of the nuisance, trespass and air pollution described herein, the plaintiffs have been denied use of these features. They have been denied the use of their terrace because of the dirt, noise and odors; and that although the view can be enjoyed from indoors, the house cannot be ventilated and cooled through open windows and doors by the ocean breeze because of the same dirt, noise and odors more fully described elsewhere herein, which make opening the doors and windows prohibitive;

(e) The plaintiffs purchased their home to enjoy the out-of-doors living and comfortable indoor living without air-

conditioning, and both features have been substantially and significantly damaged and/or destroyed by the defendants and each of them as herein alleged and a commensurate diminution and/or destruction in value;

(f) The plaintiffs have incorporated a group of photographs into their group Exhibit B1-20 which demonstrates in a tangible and concrete manner that what has been alleged as the reason for their purchase and subsequent improvements was not an after-thought but was a distinct and reasonable investment-backed expectation.

62. That notwithstanding that no claim is required to be filed against "The City" by the plaintiffs in order to maintain their action (Government Code §905.1), the plaintiffs did on the 26th of September, 1991, deliver to "The City" a copy of a first draft of a complaint, which included causes of action for writ of mandate, inverse condemnation, declaratory relief to determine the validity of the ordinance and statute in question, negligence and nuisance.

63. As a result of the above-described damages to the named plaintiffs' property, they have been damaged in excess of one hundred thousand ($100,000.00) dollars, and by this reference plaintiffs hereby incorporate the specific allegations of damages in this complaint set forth.

64. As a direct and proximate cause of "The City's" diverting the traffic from Alicante Road, the pattern and volume of traffic on Corte de la Vista has resulted in the creation of the nuisance and air pollution herein alleged.

65. Plaintiffs have received no compensation for their damages, nor has "The City" instituted eminent domain proceedings. This cause is in the alternative and in lieu of plaintiffs' first cause of action for inverse condemnation. This action will only be pursued if plaintiffs are denied recovery for their inverse condemnation cause by a final order and after the time to appeal has expired or during the time the appeal is pending.

66. "The City's" decision to divert traffic as aforesaid, without paying to the plaintiffs the just compensation for the damage is in violation of plaintiffs' due process rights, equal

protection rights, proportionality rights, and liberty and privacy rights, contained in both the state and federal Constitutions; both as applied and on its face.

67. At all times herein mentioned there was in full force and effect the federal Civil Rights Act of 1871 which permits an individual to maintain a cause of action against a person acting under color of state law who violates the individual's constitutional or other federally protected rights. Except for a portion of the statute that applies to the District of Columbia, the full text of 42 USC §1983 reads:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."

68. That "The City's" acts and omissions giving rise to this cause of action was as a result of their City Council and its Planning Commission as herein specifically alleged. The detailed allegations support the fact that "The City" engaged in affirmative wrongdoing which resulted in denying the plaintiffs their rights, privileges or immunities secured by the Constitution. The City Council is "The City's" final authority and sets policy, as well as usage and custom. "The City" was carrying out governmental policy and acting under the "S.M.A." as well as its subdivision ordinance and accordingly was acting under color of state law.

69. "The City" failed and neglected to give the plaintiffs a meaningful notice of the hearing relating to the proceeding to approve the tentative map. "The City" gave no notice at all for the hearing relating to the proceeding to approve the final map and this notwithstanding that the hearing was or should have

been adjudicatory in nature. Facts to support this allegation are alleged herein and incorporated by reference.

70. That at the hearing by the Planning Commission on October 3, 1990 generally described hereinabove, the plaintiff Thomas A. Mass was cut off from speaking in less than half the time permitted. Upon protest, the chairperson permitted him to continue for only a few more minutes and summarily refused to grant him the time permitted, cut the sound from his microphone and permitted "The City's" and "The Developer's" employees to answer a few of the charges that he was able to present. The employees as aforesaid were permitted unlimited time to present their argument, the plaintiffs were denied the right to cross-examine them or even reply to them. The full time provided for under "The City's" rules is grossly inadequate for a fair trial and even this time was arbitrarily emasculated and constitutes an abuse of discretion.

71. One of the Commissioners, in rejecting the plaintiffs' objections, stated in substance as follows: As long as Mr. Mass believes that "The City" will be subjected to lawsuits for compensatory damages it is reason enough to rely on "The City's" employees' recommendations.

72. The hearing of the City Council on December 18, 1990 which is more fully described elsewhere herein and by reference incorporated herein, was not a fair predeprivation hearing. The procedures were designed and applied merely to evoke and record a public response and did not provide the plaintiffs a fair and meaningful predeprivation hearing and violated the plaintiff's property rights as well as their civil rights.

73. That the plaintiffs believe and state the facts to be that the procedures followed in carrying out "The City's" duty under state law and pursuant to color of law were not an isolated incident but were pursuant to long usage and custom and constitute an unconstitutional municipal policy.

74. The City Council has the final authority and makes the final decision and sets policy for "The City" and cannot be reviewed or overruled by anyone in the City government as an entity. The only review is by judicial review in a writ of mandate proceeding.

75. The policy and/or custom of "The City" was the cause-in-fact of plaintiffs being deprived of their constitutional rights to meaningful notice and a fair hearing. But for the fact that "The City" failed to provide to the plaintiffs a meaningful notice or a fair hearing they would not have been damaged.

76. That as a proximate result of The City's" acts and omissions as aforesaid the plaintiffs were denied a constitutional meaningful notice and a fair hearing and as a direct result of such deprivations of their rights the plaintiffs have been denied the use and enjoyment of their property and a substantial diminution of the value of their property. The above allegations are supported by detailed allegations set forth hereinabove.

77. The nature and extent of the plaintiffs' damages as a result of being denied their constitutional rights was apparent and foreseeable to any reasonable person. "The City" should have been aware of such a common and reasonable chain of events. Further, "The City" was expressly advised by the plaintiffs of their potential damages by so advising the Planning Department, the Planning Commission, and the City Council prior to their hearings and/or decision.

78. Plaintiffs have incurred and will incur attorneys', appraisal, environmental experts and engineering fees because of this proceeding, in amounts that cannot yet be ascertained, which are recoverable in their action under the provisions of Section 1036 of the Code of Civil Procedure.

79. An actual controversy has arisen and now exists between the plaintiffs and the defendants as to the legal consequences resulting from the facts that have and will occur as hereinabove alleged.

80. Plaintiffs desire a judicial determination of their rights and duties, and a declaration that they may pursue their remedies for damages.

81. A judicial declaration is necessary and appropriate in order that the parties may take appropriate steps to mitigate their damages; and will also serve considerations of judicial economy.

WHEREFORE, plaintiffs pray judgment as follows:

A. For a writ of mandate directing "The City" to set aside its decision of January 8, 1991 approving the tentative map, and its decision of September 3, 1991 approving the final map, as being non-existent under the law and ab initio null and void because there has been a prejudicial abuse of discretion and the denial of a fair hearing pursuant to meaningful notice, and the proceedings were without, or in excess of, their jurisdiction over the plaintiffs, because they were not given a meaningful notice or a fair hearing in the predeprivation proceedings, or in the alternative;

For a money judgment based upon the difference in value of the plaintiffs' property between its fair market value prior to the acts complained of herein and the fair market value after the acts complained of herein as well as the loss of the monetary value that plaintiffs suffered from the loss of their use and enjoyment of their property.

B. That in the event the Court finds that there was no deprivation of the plaintiffs' constitutional rights, but it also finds that the proceeding leading to "The City's" decision to approve the final map was "adjudicatory," then and only then will plaintiffs seek to challenge the propriety of the decision pursuant to the traditional remedy provided by the writ of mandate, and accordingly hereby pray for such relief as well as such other and further relief as may be deemed necessary and proper.

C. Declaring the respective rights and duties of the parties; and declaring that the statutes, ordinances and proceedings are invalid and void on their face, or as applied to plaintiffs, or are not applicable to plaintiffs if valid.

D. For such other relief which plaintiffs are entitled to by the facts alleged in their complaint, whether injunctive, in declaratory relief or otherwise, as the Court deems most appropriate.

E. For punitive damages if individual defendants are joined, in an amount appropriate to punish them for their wrongful conduct and set an example for others.

F. For reasonable attorney's fees, in addition to any other relief granted or other costs awarded.

G. For costs of suit herein incurred and for reasonable litigation expenses.

H. For such other and further relief as the Court may deem proper.

Dated: August 6, 1992

THOMAS A. MASS
Plaintiff In Pro Per

JANET A. MASS
Plaintiff In Pro Per

DEMAND FOR JURY TRIAL

Plaintiffs in the above-entitled action request a trial by jury as provided by Amendment VII of the United States Constitution and the laws of California.

VERIFICATION

I, THOMAS A. MASS, am one of the plaintiffs in the above-entitled action. I have read the foregoing THIRD AMENDED COMPLAINT FOR PLAINTIFFS' THIRD CAUSE OF ACTION FOR A WRIT OF MANDATE IN THE ALTERNATIVE, and know the contents thereof. The same is true of my own knowledge except as to those matters which are therein alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Carlsbad, California, this 6th day of August, 1992.

THOMAS A. MASS
2851 Torry Court
Carlsbad, CA 92009
Phone: (619) 931-0100
FAX: (619) 438-7850

PROOF OF SERVICE OMITTED IN PRINTING

From the Desk of
THOMAS A. MASS

7 August 1991

The Villages of La Costa
P.O. Box 9000-266
Carlsbad, CA 92009

Attention: Mrs. Bradstreet

Re: Fieldstone Company's Fairways Project

Dear Neighbor:

I have been meaning to go on record with you as to my objections to your project, The Fairways. This a.m. at 4:30 your grading contractor started unloading its heavy duty equipment and it sounded like "operation Fairway storm." This "serenade" under our bedroom window provided me with the motivation to get this letter off without delay.

As you know, Courte de La Vista "T's" into Alicante Road, and this exit is blind to traffic coming up the hill. Because of the tenforld increase in traffic, it's reasonable to expect an accident and all the tragic things that will result. Therefore, I urge you not to plac eyour entrance on Courte de La Vista, but rather, on Alicante Road.

The entrance of Courte de La Vista also adversely affects the residential nature of the street we front on; we can expect noise, fumes, flashing headlights in our homes, etc., which were designed to capitalize on the tranquil view and fresh air. You have made a residential low use road into a high traffic artery.

EXHIBIT A

You have shown no sensitivity for the safety or aesthetics of our community. In mitigation, you should minimize these assaults on our environment by such steps as" low one-story homes at the high entryway; install glass walls on the homes that front on Courte de La Vista between Alicante Road and the entryway; speed and quiet zone signs; and appropriate landscaping.

Your future conduct will show your intentions.

Very truly yours,
THOMAS A. MASS

TAM/ds

NOTICE OF PUBLIC HEARING
CT 90-23/PUD 90-23/HDP 90-29

NOTICE IS HEREBY GIVEN that the City Council of the City of Carlsbad will hold a public hearing at the City Council Chambers, 1200 Carlsbad Village Drive (formerly Elm Avenue), Carlsbad, California, at 6:00 P.M., on Tuesday, December 18, 1990, to consider an application for a tentative map, planned unit development and hillside development permit for 132 single family detached homes on 41.09 acres of land in the RDM zone and Local Facilities Mnagement Zone 6 on property generally located south of Corte de la Vista, east of Alicante Road and north of the La Costa Gold Course and more particularly described as:

> Parcel 2 of Parcel Map No. 11722, in the City of Carlsbad, County of San Diego, according to map thereof filed in e office of the County Recorder of San Diego County on October 10, 1981 as file no. 81-322184 of Official Records.

If you have any questions regarding this matter, please call the Planning Department at 438-1161.

If you challenge the Tentative Tract Map/Planned Unit Development/Hillside Development Permit in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice or in written correspondence delivered to the City of Carlsbad City Clerk's Office at or prior to the public hearing.

APPLICANT: Fieldstone Company
PUBLISH: December 6, 1990
CARLSBAD CITY COUNCIL

MAP OMITTED IN PRINTING

EXHIBIT C

CITY OF CARLSBAD
CITY COUNCIL MEETING
CARLSBAD MUNICIPAL WATER DISTRICT MEETING
HOUSING AND REDEVELOPMENT COMMISSION MEETING

AGENDA
DECEMBER 18, 1990

NOTICE TO THE PUBLIC

1. Citizens may have an item listed on the agenda by sumbitting a letter to the City Manager ten (10) days prior to the meeting.

2. It is Council's policy to adjourn meetings no later than 10:00 P.M.

3. Meetings are divided into categories shown below.

4. When you are called to speak, please come forward and state your name and address.

CONSENT CALENDAR: If you desire to talk about an item on the Consent Calendar, a written **"Request to Speak"** form must be filed with the City Clerk prior to the time the Consent Calendar is called. The items listed under Consent Calendar are considered routine and will be enacted by one motion as listed. There will be no separate discussion on these items prior to the bote, unless an item is removed.

PUBLIC COMMENT: If you desire to speak about an item not listed on the agenda, a pink **"Time Reservation Request"** form should be filed with the City Clerk. A total of 15 minutes is provided for the Public Comment portion of the Agenda. Speakers are limited to three (3) minutes each.

EXHIBIT D

In conformance with the Brown Act, no action can occur on items presented during Public Comment.

PUBLIC HEARINGS: It is not necessary to file a request to speak on items listed on this agend as Public Hearings.

ALL OTHER CATEGORIES: For all other agenda items a **"Request to Speak"** form must be filed with the City Clerk before the item is announced. There is a five (5) minute time limit for individual speakers.

MINUTES

Meeting of:	PLANNING COMMISSION
Time of Meeting:	6:00 p.m.
Date of Meeting:	October 3, 1990
Place of Meeting:	City Council Chambers

MINUTES OMITTED IN PRINTING, EXCEPT PAGE 2, PARAGRAPH 3:

> "The project is proposed as a gated community. The gate design is single access off Corte de la Vista and it provides a turnaround area at the entrance. The location of the single access was dictated by staff. The original proposal came in with an access off Alicante Road; however, for traffic safety purposes, staff requested that the entrance be moved to Corte de la Vista."

EXHIBIT E

FILED
Clerk of the Superior Court
Aug 31 1992
Vista Branch

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

THOMAS A. MASS and JANET A. MASS, Plaintiffs

v.

CITY OF CARLSBAD, a Municipal Corporation; FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP, a California Limited Partnership, Defendants

Case No. N53303

AMENDED AND SUPPLEMENTAL COMPLAINT FOR PLAINTIFFS' CAUSE OF ACTIONS BASED ON THE DEPRIVATION OF THEIR RIGHTS SECURED BY THE UNITED STATES CONSTITUTION, REQUESTING MONEY DAMAGES, DECLARATORY RELIEF AND EQUITABLE RELIEF INCLUDIGN AN INJUNCTION. [42 U.S.C. §§1983, 1985, 1986, 1988]

This Amended and Supplemental Complaint is being filed pursuant to §472 of the Code of Civil Procedure of the State of California. The Court in its telephonic temporary ruling on July 27, 1992 sustained defendants' demurrer to plaintiffs' second amended complaint in its entirety. Plaintiffs were not given leave to amend their first or second causes of action but the Court did grant to the plaintiffs leave to amend their third cause of action. On August 6, 1992 plaintiffs filed their Third Amended Complaint as to their third cause of action.

FOURTH CAUSE OF ACTION

Deprivation of Rights Under Color of State Law
[42 U.S.C. §§1983, 1985, 1986, 1988]
(Plaintiffs vs. "The City" Defendants)

82. Plaintiffs incorporate paragraphs 1 through 81 both inclusive of their third cause of action in their third amended complaint as though fully set out here, including the exhibits thereto attached.

83. As herein stated, this action is based on the deprivation of plaintiffs' rights under color of state law brought pursuant to the Civil Rights Act of 1871, Title 42 United States Code §§1983, 1985, 1986, 1988 (1988 Civil Rights Act), for remedies that the court may seem just, for "The City's" deprivation of plaintiffs' civil and property rights.

84. Plaintiffs allege that by virtue of their acts and omissions hereinabove set out in detail, "The City," under color of state law, deprived the plaintiffs of their guaranteed and protected rights under the Fifth Amendment of the United States Constitution by taking their property for public use without just compensation.

85. That by virtue of the negligent acts and omissions of "The Developer" as herein specifically alleged, during the grading and utilities placement work on the "Fairways Project" which has been in continuous operation for over thirteen months, the pollution caused by the negligent manner in which the site preparation was performed resulted in the plaintiffs losing the value of the use and enjoyment of their property (see plaintiffs' Exhibit F).

86. That at all times during the site preparation phase of construction, "The Developer," who was subject to the direction and approval of "The City," performed their construction in a manner which was negligent as aforesaid, and "The City" had full power and authority to stop the job if not performed in accordance with the plan or performed in a negligent manner. "The City's" failure to exercise its authority, as under the circumstances it was under a duty to do, was an abuse of

governmental powers resulting in permanent loss to the plaintiffs of their protected property rights as aforesaid.

87. The plaintiffs' property rights to the free use and enjoyment of their property and their right to exclude has been violated by "The City's" acts and omissions as aforesaid. This abuse of power and deliberate indifference to the damages the plaintiffs were sustaining is a deprivation of plaintiffs' constitutional rights as aforesaid, and is particularly egregious in light of the fact that "The City" knew the nature and extent of the injuries that were occurring to plaintiffs.

88. The special relationship that exists between "The City" and the citizens in general and particularly the plaintiffs who had given actual notice to "The City" of their claim, places an additional duty on "The City," which they breached, resulting in the deprivation as aforesaid.

89. This failure of "The City" to discharge its duty was an abuse of governmental powers, would shock the conscience of an ordinary person, and thus constitutes an unlawful taking, denial of equal protection, and procedural denial of due process. "The City" has a constitutional duty to protect the plaintiffs from such a calamitous result and deprivation as aforesaid.

90. That upon completion of the "Fairways Project," which can reasonably be expected to take two or more years from the completion of its site preparation which is still in progress, and based on "The City's" Interim Traffic Impact Fee for Southeastern Area (La Costa) Ordinance, 18.42.000 et seq, the "Fairways Project" alone will result in generating over 1,300 "trips" each weekday.

91. The Court will take judicial notice that there are 1,440 minutes in each one day period; and that one motor vehicle every minute entering and exiting a gate which is directly across the street from plaintiffs' home, together with braking and accelerating, will cause air and noise pollution to the plaintiffs and their property.

92. That as a direct and proximate cause of the dust, dirt, debris, noxious odors, flashing lights at night and street noise,

the plaintiffs have been and will continue to be peculiarly and substantially damaged.

93. That the location of the access to the "Fairways Project" across the street from the plaintiffs' homes has caused a destruction of their valuable property rights and rendered their property untenantable. The unique property rights formerly enjoyed by the plaintiffs was the essence of the reason they purchased the property and paid a premium for its location and view.

94. The view is still there but cannot be enjoyed because of the dirt, noise and air pollution, as aforesaid.

95. The essence of the actionable air pollution hereinabove described is that it damages, if not destroys, the plaintiffs' personal enjoyment of their terrace. It also has the effect of lessening the value of the property and may affect the health of the plaintiffs. It also requires that doors and windows be kept closed at all times, and will thereby force the plaintiffs to install air conditioning which they cannot tolerate.

96. "The City" allowed "The Developer" to continue emission of fugitive dust from its operation and use of unpaved roads, open storage files, demolition and disturbed surface area, so that the presence of such dust remains visible in the atmosphere above the plaintiffs' property and deposits large amounts of visible, particulate matter on the plaintiffs and their property, and that has continued for over a year.

97. That upon completion of construction we can reasonably expect that the "Fairways Project" will generate one motor vehicle every minute every day and night. This extraordinary and unexpected volume in traffic will all be focused across the street from the plaintiffs' home and will result in the air pollution hereinabove described and increase the ozone, exhaust contaminants, carbon monoxide and fine particles that will be injurious to plaintiffs and their property as herein more fully alleged, all as a direct and proximate result of "The City's" abuse of its governmental power as aforesaid.

98. That as a direct and proximate result of "The City's" aforesaid acts and omissions all done under color of state law, the plaintiffs were deprived of their civil rights and property

rights under the Constitution and in violation of the Federal Civil Rights Act inasmuch as their property was taken for public use and without just compensation.

99. But for "The City's" decision to divert the traffic from Alicante Road to the one point of access to the "Fairways Project" on Corte de la Vista, the permanent taking of plaintiffs property would not have occurred. "The City's" decision is in excess of its authority and flawed in its execution; thus null and void and should be set aside. (Vehicle Code §21 et seq.)

100. If the court required that the gate be relocated to its original location and the Corte de la Vista access be shut down, plaintiffs' compensatory damages would be limited to the taking resulting from the manner in which construction has been performed to date.

101. That on July 27, 1992, the court entered its tentative telephonic ruling which provided in part the following:

> "DEFENDANTS' DEMURRER TO PLAINTIFFS' SECOND AMENDED COMPLAINT SUSTAINED IN ITS ENTIRETY, PER CCP SECTION 430.10.
>
> 1. PLAINTIFFS' FIRST CAUSE OF ACTION, FOR INVERSE CONDEMNATION, IS DEFICIENT IN THAT PLAINTIFFS HAVE FAILED TO PLEAD FACTS SHOWING THE LOSS OF THE PRIMARY USE AND VALUE OF THEIR PROPERTY. A TEMPORARY INJURY RESULTING FROM ACTUAL CONSTRUCTION OF PUBLIC IMPROVEMENTS IS GENERALLY NONCOMPENSABLE. People ex rel. Department of Public Works v. Ayon (1960) 54 Cal.2d 217, 228. PLAINTIFFS HAVE FAILED TO PLEAD FACTS GIVING RISE TO A CLAIM FOR INVERSE CONDEMNATION.
>
> FURTHERMORE, PLAINTIFFS' CHALLENGE TO THE VALIDITY OF THE RELEVANT

TENTATIVE AND FINAL MAPS IS BARRED BY THE 90 DAY LIMITATION PERIOD SET FORTH IN GOVT. CODE 66499.37.

THE DEMURRER TO THE FIRST CAUSE OF ACTION IS SUSTAINED WITHOUT LEAVE TO AMEND."

102. That the law of this case, albeit improvident, is such that plaintiffs as of August 7, 1992, the day the court confirmed its tentative ruling, do not have an adequate state court remedy for a post deprivation hearing or an action for inverse condemnation, to provide them compensation for Fifth Amendment taking. That plaintiffs' federal civil rights claim first became ripe on August 7, 1992, and is not barred by any state immunities or claims-presentation requirements.

103. That the allegations herein support the fact that "The Developer" was under a license by "The City" approving the subdivision map and granting the necessary permits to develop the "Fairways Project" pursuant to an extensive system of governmental regulations based upon state laws and "The City's ordinances, policy and custom.

104. That "The Developer" in developing the site operated under the color of law because of the close nexus with "The City," and further, because the nature of the functions performed by them are functions that are traditionally performed by governments. "The Developer" installed the utilities, including water, storm sewers, sanitary sewers, gas and electricity. They also constructed retaining walls, roads and access facilities, all in accordance with plans and specifications approved by "The City" and supervised by them.

105. "The City's" liability is not being based upon plaintiffs' allegations that they caused "The Developer" to perform in the manner it did, but upon its failure to prevent the alleged infringement of federal rights that were fairly attributable to them.

106. That "The City's" acts and omissions of authorizing, compelling, or sanctioning the manner in which "The

Developer" performed the site preparation were the direct and proximate cause of the deprivation of plaintiffs' rights as aforesaid.

107. That the plaintiffs, based upon information and belief, state that there exists between the defendants written agreements, among which there exists an indemnification agreement wherein "The City" has insulated itself from the wrongful acts and omissions of "The Developer." That the plaintiffs further believe and so state the facts that notwithstanding the existence of an indemnity agreement or not the defendants are liable jointly and severally to the plaintiffs. That §1985 of said Civil Rights Act provides in part as follows:

> "Conspiracy to interfere with Civil rights.
>
> ". . .
>
> "Obstructing justice; intimidating party, . . . ¶(2) . . . if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;
>
> ". . .
>
> "Depriving persons of rights or privileges. ¶(3) If two or more persons in any State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such

> conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

108. That §1986 of said Civil Rights Act provides in part as \follows:

> "Action for neglect to prevent. ¶ Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; . . .

109. That plaintiffs are informed and believe and further based on the conduct of "The City" and "The Developer" herein alleged in detail and thereon allege that these defendants have obstructed justice and intimidated the plaintiffs with intent to deny them their rights, privileges and immunities, as herein alleged, of their property, and from lawfully enforcing or attempting to enforce said rights.

110. That plaintiffs are informed and believe and further based on the conduct of "The City" and "The Developer" herein alleged in detail and thereon allege that these defendants have obstructed and continue to deprive the plaintiffs of their rights as aforesaid by conspiring for the purpose of depriving them of their constitutional rights and the Civil Rights Act, and have taken their property and denied them substantive and procedural due process as well as equal protection, to their substantial and significant damages as herein alleged.

111. That plaintiffs are informed and believe and further based on the conduct of "The City" and "The Developer" herein alleged in detail and thereon allege that these defendants have obstructed, also, by virtue of their conduct in this case by their pleadings and their memorandums of points and authorities, demonstrated their obstruction of justice and intimidation of the plaintiffs as aforesaid, and that said conduct implicitly establishes the essential elements of a cause of action based on §§1875 and 1986 of the federal Civil Rights Act.

112. That the defendants and each of them made explicit what was implicit when their attorney on August 7, 1992, after leaving the courtroom and in the corridors of the courthouse on the way to the exit stated to plaintiff that if he continued to file actions based on the facts contained in plaintiffs' First and Second causes of action he would seek sanctions against them.

113. That the threat thus made was in anger and made with the intent to intimidate these plaintiffs and continued a course of conduct that has deprived these plaintiffs of their constitutional rights as alleged and with full knowledge of the wrongs conspired to be done under the United States Constitution and the Civil Rights Act.

114. That all of the wrongful acts of these defendants were such that they and each of them knew that such acts could have been prevented by their reasonable diligence, and were expressly communicated by plaintiff to them years ago but they have and continue to act to prevent the perpetration of said wrongful acts.

115. That because of the age and lifestyle of these plaintiffs injunctive relief is the only meaningful remedy because money damages are inadequate and would only increase their net worth which would benefit their heirs but not them. Not only do the plaintiffs need injunctive relief, they need it now before the case drags out to exceed their life expectancy.

116. "The City" acting under color of law has deprived plaintiffs a property interest protected by the Fifth Amendment and by Section 1 of the Fourteenth Amendment of the United States Constitution as herein alleged in particularity.

117. "The City" acting under color of law deprived plaintiffs of their procedural and substantive due process protected by Section 1 of the Fourteenth Amendment of the United States Constitution as herein alleged in particularity.

118. "The City" acting under color of law has deprived plaintiffs of their right to equal protection of the law protected by Section 1 of the United States Constitution inasmuch as its ordinance relating to time limits for judicial review provides in substance in Section 1.16.010 that employees and applicants for a license shall be given written notice of any decision made as a result of an adjudicatory administrative hearing and the time within which judicial review must be sought. The Court is requested to take judicial notice of this ordinance. That the plaintiffs as contiguous property owners were invited to a hearing designed and applied merely to evoke and record a public response. The plaintiffs had no notice or any knowledge that this was a predeprivation proceeding where they are bound by the decision, and without a fair hearing, and without any notice of their rights to judicial review, as herein more fully alleged.

119. That plaintiffs as contiguous property owners entitled to notice of an application relating to a proposed subdivision have substantial and significant protected property interests and they were not given the equal protection of others with less at risk; in fact they not only were not given any protection, they were fraudulently misled and deceived by what was done and perfected by a conspiracy of silence, all of which is herein alleged in particularity.

120. The plaintiffs in anticipation of the defendants' defense of a bar to their cause of action based upon the federal Civil Rights Act, set forth facts that are in avoidance, to wit: the determination of the applicable statute of limitations rests upon the nature of plaintiffs' rights as herein alleged, e.g., the three year statute in connection with an action created by statute, or for trespass to real property, or an action to recover for physical damages to private property under §19 of Article I of the California Constitution.

121. The plaintiffs, based upon information and belief, state that their cause of action based upon the federal Civil Rights Act was not an available remedy and no suit could be maintained upon it until it accrued, which did not happen until the 27th day of July 1992.

122. That the plaintiffs, based upon information and belief, state that from any other prior date until said July 27, 1992, they were under a legal inhibition to sue because their cause of action was not ripe and thus under a constructive stay until their cause became ripe, to wit: July 27, 1992.

123. The defendants first had notice of plaintiffs' objections to "The City's" traffic diversion plan as herein alleged in late spring and early summer of 1990; again and orally before "The City's" Planning Commission on October 3, 1990; and before "The City's" City Council on December 18, 1990. The first formal written notice was given to these defendants on September 26, 1991, by delivery to them of a first draft of a complaint against both of them by the plaintiffs for a writ of mandate, inverse condemnation, nuisance, negligence, and violation of constitutional rights growing out of the "S.M.A." and "The City's" subdivision ordinance relating to the misleading notice and unfair hearing.

124. That the plaintiffs' cause of action based upon the Civil Rights Act as aforesaid rests basically on the same facts as alleged in their prior notice, objections and complaints, and the defendants have not been prejudiced in gathering evidence to defend against this claim or in any other way.

125. That the plaintiffs could not have pursued this cause of action any earlier then they did and the record in this cause supports plaintiffs' statement that they acted reasonably and in good faith in filing this new cause of action promptly upon becoming ripe.

126. That the plaintiffs, based upon information and belief, allege that §66499.37 of the Government Code has no application to any cause of action based on a request for money damages to non-parties nor in privity with the parties, and the decision was made pursuant to unconstitutional notice and

hearings, and based upon the factual allegations hereinabove stated, said §66499.37 cannot be a bar to these plaintiffs.

127. That the plaintiffs, based upon information and belief, state as to all other causes of action alleged in this, their "Fourth Cause of Action" upon which their civil rights cause of action rests upon, that they have good and valid facts
to support the avoidance of a defense based on the statute of limitations.

128. That the plaintiffs, based upon information and belief, state that the factual statements herein alleged support the fact that the defendants and each of them concealed material facts by neglecting to notify these plaintiffs that the decision approving the tentative map was a final order and that unless plaintiffs sought judicial review of that decision they would be deprived of their property. Further, they neglected to notify these plaintiffs that the time within which to seek judicial review was only ninety days and what the results of failing to file within the statutory time limit would be.

129. The plaintiffs allege that the defendants and each of them knew that by virtue of the plaintiffs' objections and their tenacity that they intended to pursue this matter by exhausting all legal remedies available. That the defendants and each of them knew or should have known that plaintiffs were relying on defendants to be notified as to the requirements to perfect their pursuit. That neither of the defendants at any time notified the plaintiffs that the decision approving the tentative map was a final order or that there would be no further hearing in connection with the final approval of the map until after plaintiffs found out with due diligence.

130. That both of the defendants were aware of the rules, knew of the plaintiffs' interest in pursuing their rights, and knew that plaintiffs were relying on them to be notified as aforesaid and failed and neglected to properly notify plaintiffs. That based upon the facts and circumstances as herein alleged these defendants and each of them had an affirmative duty to disclose to plaintiffs their rights and requirements, that these were material facts, and their failure to so disclose was a fraudulent concealment, which plaintiffs relied upon and to their detriment.

131. That the relationship between the plaintiffs and "The City" was not deemed adversarial and the plaintiffs believed that as citizens, their government, particularly local government, was there to serve and protect their rights. "The City" by their ostensible conduct led plaintiffs to believe that they would protect their rights.

132. That the relationship between the plaintiffs and "The Developer" was deemed by the plaintiffs to be one of a prospective good neighbor. "The Developer" by letters and advertisements and public relations, as well as by the numerous occasions the plaintiffs have interfaced with them, make every effort to create the image of the "good neighbor" and to be of service to the community.

133. That the plaintiffs, based upon their justified perception of the defendants, trusted in them and in good faith relied on them because of the aforesaid special relationship which was tantamount to a fiduciary relationship.

134. That the plaintiffs allege that because of the above allegations they did not perceive that they were in imminent danger of being damaged and prejudiced and being denied their constitutional rights and the loss of valuable protected property rights. That the plaintiffs did not discover, nor under the circumstances hereinabove alleged could they have discovered through the exercise of reasonable diligence, until the middle of September 1991 did they discover the true state of the facts.

135. That the plaintiffs allege that it would be manifestly unjust to deprive the plaintiffs of a cause of action before the plaintiffs were aware that they had been damaged based upon the facts alleged herein.

136. That the plaintiffs further allege that because the defendants are guilty of continuing violations and further because the causes of action herein alleged show that the actions are based on progressively developing and continuing wrongs, and the nature and extent and the permanence of the harm is at this time difficult to determine and/or discover, the running of the period of limitations should, in the interest of justice, should

be suspended until discovery of, or the opportunity to discover the facts.

137. That the plaintiffs allege that it would be inequitable and unjust to permit the defendants and each of them from raising a bar to plaintiffs' claims based upon limitations. That based upon the allegations herein, the defendants neglected to furnish a meaningful notice to plaintiffs and lulled them into a false sense of security. That the defendants knew of the statute of limitations and further knew that they lulled plaintiffs into sleep, and that plaintiffs in reliance on their conduct were ignorant of the limitations and were damaged thereby, all as hereinabove alleged.

138. That the egregious conduct of "The City" in the misleading notice that they did give the plaintiffs of the sham hearings had in this matter should bar them from raising the defense of limitations. That based upon the facts herein alleged and upon considerations of fairness and justice, "The City" should be prevented from raising the defense of the statute of limitations contained in Government Code §66499.37.

139. That by virtue of the acts and omissions of "The City" as herein described and "The Developer" as hereinafter described, these defendants conspired and attempted to hinder, impede, obstruct or defeat the due course of justice with intent to injure plaintiffs and to deny them their rights under the United States Constitution as aforesaid and within the meaning of 42 U.S.C. §§1983, 1985(2) and (3) and 1986.

140. That the limitations period of ninety days contained in §66499.37 of the Government Code, as used in connection with the "S.M.A." is unconstitutional on its face as well as upon the facts alleged in this complaint, as applied to plaintiffs. It is a trap, to invite contiguous property owners into a hearing which is designed and applied merely to evoke and record a public response. It is manifestly inequitable as to amount to a total denial of justice and is unconstitutional. Without any notice that it is to be a predeprivation of property proceeding, and further, not to be given any notice of the decision or the fact that you must seek judicial review within ninety days of the decision or

you will be denied a remedy is so shocking as to stun a person of average sensitivity.

WHEREFORE, plaintiffs request judgment as follows against "The City":

A. For a money judgment based upon the difference in value of the plaintiffs' property between its fair market value prior to the "taking" by the acts herein complained about, and the fair market value after the "taking" as aforesaid;

B. For a money judgment based on the value of the loss of plaintiffs' use and enjoyment of their property for the period involved;

C. For a money judgment for the interest on the judgment entered commencing when plaintiffs notified "The City" of the nature and extent of their claim;

D. For a money judgment for general damages in an amount according to proof;

E. For injunctive relief based upon the Court's discretion and upon the complaint generally and as specified in paragraphs 99 and 100;

F. For reasonable attorney's fees pursuant to Title 42 of the United States Code, Section 1988. Sections 1988(b) provides in part as follows:

> "Attorney's Fees. ¶In any action or proceeding to enforce a provision of sections . . . of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs."

G. For reasonable appraisal, engineering and other expert fees according to proof and §1988(c) which provides in words and figures as follows:

> "Expert Fees. ¶In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981

or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee."

H. For costs of suit herein incurred; and

I. For such other and further relief as the Court deems proper.

DEMAND FOR JURY TRIAL AND VIEW

PLAINTIFFS REQUEST TRIAL BY JURY AND THAT THE JURY BE PERMITTED TO VIEW THE "FAIRWAYS PROJECT" AND THE PLAINTIFFS' PREMISES.

FIFTH CAUSE OF ACTION

Deprivation of Rights Under Color of State Law
[42 U.S.C. §§1983, 1985, 1986 and 1988]
(Plaintiffs vs. "The Developer")

141. Plaintiff incorporates paragraphs 82 through 140 of their Fourth Cause of Action in their Amended and Supplemental Complaint as though fully set out here including the exhibits attached thereto.

142. The above referred to order and ruling of July 27, 1992 and confirmed on August 7, 1992, also provided in part as follows:

> "2. PLAINTIFFS' SECOND CAUSE OF ACTION IS DEFICIENT IN THAT THE ALLEGEDLY WRONGFUL ACTS WERE ADMITTEDLY UNDERTAKEN WITH EXPRESS PUBLIC APPROVAL. A NUISANCE CLAIM MAY NOT BE BROUGHT FOR ACTIONS DONE OR MAINTAINED UNDER THE EXPRESS AUTHORITY OF A STATUTE, PER CIVIL CODE §3492.

THE DEMURRER TO THE SECOND CAUSE OF ACTION IS SUSTAINED WITHOUT LEAVE TO AMEND."

143. As hereinabove alleged in detail this is an action for the deprivation of plaintiffs constitutional rights under color of law brought pursuant to the federal Civil Rights Act. "The Developer," a private entity, deprived the plaintiffs of their protected rights of being free from the governmental taking of their property without just compensation, and being denied procedural and substantive due process as well as equal protection under the law as herein more fully detailed.

144. Fieldstone/La Costa Associates Limited Partnership, a California Limited Partnership ("The Developer") is the largest single land owner of residential real estate in the La Costa area of the City of Carlsbad. It is, and has been for a number of years, actively engaged in planning and constructing new residential communities and holds itself out and does business under the assumed name of "Fieldstone of La Costa."

145. "The Developer" has a large staff and retains outside consultants and contractors to plan and develop its new subdivisions. "The Developer" has been working with "The City" for five years or more on its "Fairways Project."

146. The plaintiffs allege that in "The Developer's" original plan for the "Fairways Project" submitted to both the planning department and the planning commission of "The City," located the access to said project on Alicante Road.

147. That the plaintiffs, prior to purchasing their home, investigated the proposed development below and adjacent to their property and were satisfied as to the proposed density, height and style of the homes to be built, and also relied on the location of the gate which was to be on Alicante Road. At that time, plaintiffs had no reason to believe that the gate to the development would be relocated across the street from them and would result in the nuisance, trespass and air pollution caused by the increased volume of traffic to their home. Plaintiffs were the first purchasers and selected their location over the other thirty-seven that were available in their development.

148. The plaintiffs were justifiable in their reliance on these facts, as well as the residential character of the road that they would be contiguous to and had a vested property right in them, never expecting "The City" to divert the heavy traffic of Alicante Road to Corte de la Vista and to relocate the gate to the project across the street from their home, or "The Developer" to concur and/or conspire in that decision.

149. The first notice that the plaintiffs had that the access may be located on Corte de la Vista (across the street from plaintiffs' homes) was on or about the 10th day of May, 1990, at "The Developer's" local office in La Costa.

150. The plaintiffs promptly made their objections to the location of access to the "Fairways Project" to "The Developer;" to "The City's" Planning Department and Planning Commission; as well as to the City Council and was met by indifference and refusal to lessen, mitigate or modify, or change their decision.

151. "The Developer" never made any public objection to "The City's" decision to relocate the access of the "Fairways Project." "The Developer" also failed to exhaust its administrative remedies or seek judicial review of "The City's" decision. "The Developer" knew or should have known that the relocating of the only gate to the "Fairways Project" to Corte de la Vista would result in damages to the property of others, and result in a nuisance, trespass and air pollution, but breached its duty to plaintiffs by failing to take any action to prevent or mitigate that result.

152. Commencing in August of 1991, "The Developer," with "The City's" full authorization, direction and approval, commenced construction of "The Fairways Project" in a manner which constitutes an unconstitutional taking and a deprivation of plaintiffs' constitutional rights. Noise, noxious odors and dirt in the form of dust are blown onto plaintiffs' property by prevailing winds by "The Developer's" failure and refusal to take all necessary and reasonable precautions to prevent, reduce, or mitigate the emissions as aforesaid.

153. The aforementioned occupation, use, and maintenance of the "Fairways Project" was the result of the negligent manner in which "The Developer" performed the construction, and

created a nuisance, and is the cause in fact of its damages. Such occupation substantially and unreasonably interferes with the comfortable use and enjoyment of plaintiffs' property, and may well be harmful to plaintiffs' health and is the proximate cause of the unconstitutional taking of their property.

154. On or about August 7, 1991, the plaintiff gave written notice to the "The Developer" of the injury the plaintiffs have experienced and expect to experience in the future (see plaintiffs' Exhibit "A"). Plaintiff requested "The Developer" to abate such unreasonable activity, but they have refused and continue to refuse to abate their activities as aforesaid to this date and at all hours of the day and night and in violation of "The City's" ordinance.

155. As a result of "The Developer's" acts and omissions as aforesaid, plaintiffs have been, and will be damaged by: (a) being denied the full use and enjoyment of their property; (b) the cost and or personal labor in cleaning the walks, furniture, windows and other appurtenances on a daily basis; (c) the value of the property has and will continue to decline unless this activity is abated; (d) and may be hazardous to the plaintiffs' health. As a direct and proximate result of said acts and omissions the plaintiffs have been denied their constitutionally protected rights as aforesaid.

156. That as a result of the acts of commission and omission as aforesaid, "The Developer" and "The City" are acting with full knowledge of the damages being caused to plaintiffs. Defendants' conduct is willful, oppressive and malicious. Accordingly, plaintiffs are entitled to punitive damages against "The Developer."

157. The above described dust, dirt, odors and noise have persisted and continue to persist. Plaintiffs have been denied the valuable use and enjoyment of their terrace and have been forced to keep their doors and windows closed. The focal point and value of plaintiffs' property is the terrace (for the view and the prevailing winds from the ocean), all aspects of which have been destroyed or substantially reduced; they are the primary reason for the value of the property and the exclusive reason why plaintiff purchased the property at a premium and spent an

additional amount in excess of $50,000.00 to enhance the outdoor terrace (see Group Exhibit "B").

158. The activities above described interfere with plaintiffs' possession of their property and have substantially diminished the value of their property and constitute a deprivation of their constitutional rights as aforesaid. Unless "The Developer" abates such conduct, the plaintiffs will be denied the full use and enjoyment of their property during the site preparation, which has continued over a year, and the construction, which will take several more years.

159. The vibrations, fumes and noise are offensive to the senses and deny plaintiffs the free use and enjoyment of their property. Such interference with plaintiffs' comfortable enjoyment of life and property has resulted in the substantial reduction in the market value of their property.

160. The activities above described are "continuing" and will presumably come to an end. However the activities that can be expected to start when construction is complete and the 132 homes are occupied will be "continuing and permanent" resulting in the permanent taking of their property as aforesaid.

161. That as a direct result of the dust, dirt, debris, noxious odors, flashing lights at night and street noise, the plaintiffs have been and will continue to be peculiarly and substantially damaged.

162. That the diversion of traffic to the access of the "Fairways Project" across the street from the plaintiffs' homes has caused a destruction of the valuable property rights and rendered their property untenantable. The unique property rights formerly enjoyed by the plaintiffs was the essence of the reason they purchased the property and paid a premium for its location and view.

163. The view is still there but cannot be enjoyed because of the dirt, noise and air pollution, as aforesaid.

164. The essence of the acts and omissions of the "The Developer" hereinabove described is that it damages, if not destroys, the plaintiffs' personal enjoyment of their terrace. It also has the effect of lessening the value of the property and may affect the health of the plaintiffs. It also requires that doors

and windows be kept closed at all times, and thereby will be forcing the plaintiffs to install air conditioning which they cannot tolerate.

165. Upon completion of the "Fairways Project," "The Developer" or its successors-in-title will cause continued air pollution, increasing the amount of ozone, exhaust contaminants, carbon monoxide, and fine particles that will be injurious to plaintiffs and their property as herein more fully alleged all as a direct result of their acts and omissions as aforesaid.

166. As a result of "The Developer's" acts and omissions as aforesaid the value of plaintiffs' real property has been diminished by not less than $100,000.00, and further, they have been denied the full use and enjoyment of their property, and unless abated plaintiffs' property will progressively diminish in value.

167. The exact damages that have been and will continue to be inflicted on the plaintiffs cannot at this time be determined, but will include loss of value, loss of use, clean-up expenses, repairs, and possible personal injuries. As a result of such injuries, plaintiffs have suffered general damages in an amount according to proof.

168. "The Developer" and "The City" are acting with full knowledge of the consequences and damages being caused to the plaintiffs, and their conduct is willful, oppressive, and malicious. Accordingly, plaintiffs are entitled to punitive damages against "The Developer" in a sum to be determined by the jury.

169. "The Developer" has failed to minimize the pollution caused by their site preparation, and further, has failed to implement a program of clean-up activities so as to allow the plaintiffs to make full use and enjoyment of their outdoor terrace, living, recreation and entertainment center.

170. The successor in title to "The Developer" will be the 132 homeowners. Unless the new owners are enjoined from continuing the nuisance, the plaintiffs will suffer permanent and continuing damages and deprivations of their constitutional rights. The result of such habitability will cause the plaintiffs

irreparable injuries such as the usefulness and the economic value of the plaintiffs' property will be substantially diminished and the plaintiffs will be deprived of the comfortable enjoyment of their property.

171. The diversion of traffic to the access of the "Fairways Project" has an effect on the possession of the real estate that the prospective purchasers will occupy as their residences as herein alleged.

172. That because plaintiffs may seek a permanent injunction against the prospective owners, and further, because the possession of residences will be affected by the location of the access to the "Fairways Project," it is reasonable and necessary to give them actual or constructive notice of the pendency of this action, as well as to the current and subsequent encumbrances.

173. An actual controversy has arisen and now exists between "The Developer" and their successor in title. That considerations of judicial economy as well as providing the parties an opportunity to mitigate their damages make a judicial declaration both necessary and appropriate.

174. That based on the facts hereinabove alleged, "The Developer" has caused and is causing a deprivation of plaintiffs' constitutional rights as aforesaid during the preparation of the site and the construction of the "Fairways Project;" and will be creating a condition that will create a continuing and permanent condition that will be maintained by its successor in title by permitting close to 1,500 vehicle trips a day (more than one a minute every minute of the day and night) that will come in and out of the access gate and on to Corte de la Vista located across the street from the plaintiffs' property.

175. Plaintiffs are informed and believe and thereon allege that "The Developer," as a result of their acts and omissions as aforesaid, failed to resist or exhaust its administrative and legal remedies to challenge "The City's" decision to divert the traffic from Alicante Road to Corte de la Vista and funnel all of said traffic into one access point which is located across the street from the plaintiffs' home. That the plaintiffs have repeatedly notified "The Developer" of their objections and the nature and

extent of the damages that would flow from the decision as aforesaid.

176. Plaintiffs allege that "The Developer" knew that the benefits of going along with "The City's" decision were greater than the loss the plaintiffs would suffer and that they would rather take the risk of a lawsuit from the plaintiffs.

177. The "cooperation" of "The Developer" with "The City" is tantamount to a conspiracy and the plaintiffs allege on information and belief that an indemnification agreement exists between these defendants relating to the potential damages of the plaintiff and that in any event these defendants should be held jointly and severally liable to the plaintiffs for their damages as a result of the acts and omissions of these defendants in depriving these plaintiffs of their constitutional rights under color of law as more fully alleged herein.

178. That the temporary, continuing and reversible condition that "The Developer" created by the manner in which they performed the site preparation of the "Fairways Project" is ongoing, but based on reasonable expectations the site preparation will be completed in another year and the construction of the 132 homes within three years.

179. On the other hand, "The Developer's" failure to challenge "The City's" decision to divert the traffic from Alicante Road to Corte de la Vista and focus all the ingress and egress traffic for the "Fairways Project" across the street from plaintiffs' home, or to actively cooperate with "The City" implementing said decision for its self-aggrandizement, will result in a continuing and permanent condition as a further result of "The Developer's" failure to challenge and/or in their active cooperation with "The City" in connection with implementing said decision.

180. "The Developer" at all times herein mentioned, in connection with the manner in which they performed their construction, and in their failure to challenge "The City's" decisions, and/or by actively cooperating with "The City" in connection with implementation of said decision, was acting under color of "The City's" ordinances, policy and custom.

181. "The Developer" at all times herein mentioned that are material was, in connection with the "Fairways Project," a licensee-permittee pursuant to an extensive system of governmental regulations based on state law and "The City's" ordinances, policy and custom.

182. That based on the facts herein alleged and the further fact that "The Developer" is a financial contributor to "The City's" sponsored social and community functions, there exists a close nexus between "The City" and "The Developer."

183. That by virtue of the nature of the functions performed by "The Developer" it is manifest that they are functions that are traditionally performed by "The City."

184. That based upon the facts herein alleged the plaintiffs state that "The Developer" at all times material in relationship to the "Fairways Project" was acting under color of law.

185. That by reason of "The Developer's" conduct, plaintiffs were deprived of their rights, privileges and immunities secured by them under the Constitution of the United States and laws enacted thereunder as herein alleged.

186. That as a proximate result of "The Developer's" conduct as alleged above, the plaintiffs have sustained damages as alleged above in an amount according to proof.

187. As a further proximate result of "The Developer's" conduct, plaintiffs' interests were damaged and/or destroyed in an amount according to proof.

188. The above-recited conduct of "The Developer" in depriving plaintiffs of their constitutionally protected rights were done with evil motive or intent, or with reckless or callous indifference to plaintiffs' rights.

189. Plaintiffs are informed and believe and thereon allege that "The Developer" will continue with "The City" their unlawful conduct, unless and until restrained by this court. If "The Developer" is not restrained, as herein alleged, plaintiffs will continue to suffer immediate, irreparable injury from the ongoing and reasonably expected deprivation of their rights.

WHEREFORE, plaintiffs request judgment against "The Developer" as follows:

A. That the defendant be restrained from the manner in which it is performing the construction so as to prevent and/or minimize the damages to plaintiffs and their property;

B. That the defendant be restrained from the use of the access to the "Fairways Project" on Corte de la Vista;

C. That the defendant be mandatorily required to do whatever is deemed reasonable and necessary to implement the Court's injunction;

D. A judicial declaration as to the rights and duties of the parties;

E. That upon notice, motion, and points and authorities, the Court conduct a hearing to determine the propriety of granting plaintiffs their right to file a Lis Pendens notice with the County Recorder in accordance with Code of Civil Procedure §§409-409.9;

F. Set a day certain for a jury trial, providing the parties with sufficient time to prepare their case for trial;

G. For general damages in an amount according to proof;

H. For punitive damages in an amount appropriate to punish the defendant for its wrongful conduct and set an example for others;

I. For reasonable attorney's fees pursuant to Title 42 of the United States Code §1988(b), which provides in part as follows:

> "Attorney's Fees. ¶In any action or proceeding to enforce a provision of sections . . . of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs."

J. For reasonable appraisal, engineering and other expert fees according to proof and §1988(c) which provides in words and figures as follows:

"Expert Fees. ¶In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee."

K. For costs of suit herein incurred; and

L. For such other and further relief as the Court deems proper.

Dated: August 31, 1992

THOMAS A. MASS
Plaintiff In Pro Per

JANET A. MASS
Plaintiff In Pro Per

DEMAND FOR JURY TRIAL AND VIEW

PLAINTIFFS REQUEST TRIAL BY JURY AND THAT THE JURY BE PERMITTED TO VIEW THE "FAIRWAYS PROJECT" AND THE PLAINTIFFS' PREMISES.

VERIFICATION

I, THOMAS A. MASS, am one of the plaintiffs in the above-entitled action. I have read the foregoing AMENDED AND SUPPLEMENTAL COMPLAINT FOR PLAINTIFFS' CAUSES OF ACTIONS BASED ON THE DEPRIVATION OF THEIR RIGHTS SECURED BY THE UNITED STATES CONSTITUTION, REQUESTING MONEY DAMAGES, DECLARATORY RELIEF AND EQUITABLE RELIEF INCLUDING AN INJUNCTION, and know the contents thereof. The same is true of my own knowledge except as to those matters which are therein alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Carlsbad, California, this 31st day August, 1992.

THOMAS A. MASS
2851 Torry Court
Carlsbad, CA 92009
Phone: (619) 931-0100
FAX: (619) 438-7850

PROOF OF SERVICE OMITTED IN PRINTING

FIELDSTONE LA COSTA

August 10, 1992

Dear Neighbor:

We are pleased to announce the completion of grading and utilities placement work at our new community of Fairways. To demonstrate our appreciation for your patience and understanding during this process, we have arranged for Clean Care, Inc. to wash the exterior of your homes windows.

You can schedule an appointment for this complimentary service by calling Lou Muth at 727-9560 between August 15 and August 29. We cordially ask that you make your appointment during this designated schedulign period.

It has been a pleasure getting to know our neighbors at Alicante Hills. We hope our window washing program will amend any inconveniences we've caused your family.

Again, thank you for your cooperation.

Sincerely,

CHERYL BRADSTREET
COMMUNITY RELATIONS

P.S. Fairways will celebrate its grand opening this fall. We hope your family can come take part in the festivities.

CB/ml

EXHIBIT F

Supreme Court, U.S.
FILED

(3)

941018 DEC 2 1994

OFFICE OF THE CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

THOMAS A. MASS, pro se and JANET A. MASS,
Petitioners,

v.

CITY OF CARLSBAD, a Municipal Corporation;
FIELDSTONE/LA COSTA ASSOCIATES LIMITED
PARTNERSHIP, a California Limited Partnership,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division One

APPENDIX VOLUME II

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50 pp

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APPENDIX II

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PART ONE

CONSTITUTIONS, STATUTES AND CODES

CONSTITUTION FOR THE UNITED STATES

ARTICLE SIX

. . .

This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

. . .

AMENDMENT ARTICLE FIVE

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT ARTICLE SEVEN

In suits at common law, where the value of controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

AMENDMENT ARTICLE FOURTEENTH

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the Unites States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

FEDERAL STATUTES

42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

---

42 U.S.C. § 1985. Conspiracy to interfere with civil rights

. . .

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premise of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

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42 U.S.C. § 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of

persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

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42 U.S.C. § 1988. Proceedings in vindication of civil rights; attorney's fees; expert fees

(a) Applicability of statutory and common law.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 and of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing

party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) Expert fee

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

CALIFORNIA GOVERNMENT CODE

§ 65091. Notice by mail or delivery

(a)(3) Notice of the hearing shall be mailed or delivered at least 10 days prior to the hearing to all owners of real property as shown on the latest equalized assessment roll within 300 feet of the real property that is the subject of the hearing. In lieu of utilizing the assessment roll, the local agency may utilize records of the county assessor or tax collector which contain more recent information than the assessment roll. If the number of owners to whom notice would be mailed or delivered pursuant to this paragraph or paragraph (1) is greater than 1,000, a local agency, in lieu of mailed or delivered notice, may provide notice by placing a display advertisement of at least one eighth page in at least one newspaper of general circulation within the local agency in which the proceeding is conducted at least 10 days prior to the hearing.

(c) In addition to me notice required by this section, a local agency may give notice of the hearing in any other manner it deems necessary or desirable.

---

§ 65351. Opportunities for community involvement; Public hearings

During the preparation or amendment of the general plan, the planning agency shall provide opportunities for the involvement of citizens, public agencies, public utility companies, and civic,

education, and other community groups, through public hearings and any other means the city or county deems appropriate.

---

§ 66451.4 Notice of application to owners within 300 feet

(a) In addition to the notice required by Section 66451.3, whenever approval of a tentative map will constitute a substantial or significant deprivation of the property rights of other landowners, the local agency shall provide notice of the application to all persons, including businesses, corporations, or other public or private entities, shown on the last equalized assessment roll, as owning real property within 300 feet of the property which is the subject of the application.

(b) The notice shall be given by at least one of the following methods:

(1) Direct mailing to the owners.

(2) Posting of notice by the local agency on and off the site in the area where the project is to be located.

(3) Delivery of notice by any means other than mail to the owners.

(4) Any other method reasonably calculated by the local agency to provide actual notice of the hearing.

(c) Nothing contained in this section shall preclude a local agency from providing additional notice by other means, nor shall the requirements of this section preclude the local agency from providing the necessary notice at the same time and in the same manner as public notice otherwise required by law for such project.

(Added by Stats.1980, c. 1154, p. 3808, §1, eff. Sept. 26, 1980.)

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§ 66451.4. [Added by Stats 1980 ch 1151, §2, ch 1154 §1, effective September 29, 1980, Stats 1982 ch 87 §14, effective March 1, 1982 and repealed by Stats 1984 ch 1009 §§31, 32.]

§ 66458. Approval

(a) The legislative body shall, at the meeting at which it receives the map or, at its next regular meeting after the meeting at which it receives the map, approve the map if it conforms to all the requirements of this chapter and any local subdivision ordinance applicable at the time of approval or conditional approval of the tentative map and any rulings made thereunder. If the map does not conform, the legislative body shall disapprove the map.

(b) If the legislative body does not approve or disapprove the map within the prescribed time, or any authorized extension thereof, and the map conforms to all requirements and rulings, it shall be deemed approved, and the clerk of the legislative body shall certify its approval thereon.

(c) The meeting at which the legislative body receives the map shall be the date on which the clerk of the legislative body receives the map.

---

§ 66473. Disapproval for noncompliance

A local agency shall disapprove a map for failure to meet or perform any of the requirements or conditions imposed by this division or local ordinance enacted pursuant thereto; provided that a final map shall be disapproved only for failure to meet or perform requirements or conditions which were applicable to the subdivision at the time of approval of the tentative map; and provided further that such disapproval shall be accompanied by a finding identifying the requirements or conditions which have not been met or performed. Such local ordinance shall include, but need not be limited to, a procedure for waiver of the provisions of this section when the failure of the map is the result of a technical and inadvertent error which, in the determination of the local agency, does not materially affect the validity of the map.

---

§ 66473.5. Required findings

No local agency shall approve a tentative map, or a parcel map for which a tentative map was not required, unless the legislative body finds that the proposed subdivision, together with the provisions for its design and improvement, is consistent with the general plan required by Article 5 (commencing with Section 65300) of Chapter 3 of Division 1, or any specific plan adopted pursuant to Article 8 (commencing with Section 65450) of Chapter 3 of Division 1.

A proposed subdivision shall be consistent with a general plan or a specific plan only if the local agency has officially adopted such a plan and the proposed subdivision or land use is compatible with the objectives, policies, general land uses, and programs specified in such a plan.

---

§ 66474. Denial of approval of map upon certain findings

A legislative body of a city or county shall deny approval of a tentative map, or a parcel map for which a tentative map was not required, if it makes any of the following findings:

(a) That the proposed map is not consistent with applicable general and specific plans as specified in Section 65451.

(b) That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans.

(c) That the site is not physically suitable for the type of development.

(d) That the site is not physically suitable for the proposed density of development.

(e) That the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.

(f) That the design of the subdivision or type of improvements is likely to cause serious public health problems.

(g) That the design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of, property within the proposed subdivision. In this connection, the governing body may approve a map if it finds that alternate easements, for access or for use, will be provided, and that these will be substantially equivalent to ones previously acquired by the public. This subsection shall apply only to easements of record or to easements established by judgment of a court of competent jurisdiction and no authority is hereby granted to a legislative body to determine that the public at large has acquired easements for access through or use of property within the proposed subdivision.

---

§ 66474.1. Approval of final or parcel map complying with previously approved tentative map

A legislative body shall not deny approval of a final or parcel map if it has previously approved a tentative map for the proposed subdivision and if it finds that the final or parcel map is in substantial compliance with the previously approved tentative map.

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§ 66474.9 Indemnification as condition for map application or approval

(a) Except as provided in subdivision (b), a local agency may not require, as a condition for a tentative, parcel, or final map application or approval, that the subdivider or an agent of the subdivider, defend, indemnify, or hold harmless the local agency or its agents, officers, and employees from any claim, action, or proceeding against the local agency as a result of the action or inaction of the local agency, advisory agency, appeal board, or legislative body in reviewing, approving, or denying the map.

(b)(1) A local agency may require, as a condition for a tentative, parcel, or final map application or approval, that the subdivider defend, indemnify, and hold harmless the local agency or its agents, officers, and employees from any claim, action, or proceeding against the local agency or its agents, officers, or employees to attack, set aside, void, or annul, an approval of the local agency, advisory agency, appeal board, or legislative body concerning a subdivision, which action is brought within the time period provided for in Section 66499.37. [Remainder of section omitted in printing.]

§ 66499.37. Limitation period

Any action of proceeding to attack, review, set aside, void or annul the decision of an advisory agency, appeal board or legislative body concerning a subdivision, or of any of the proceedings, acts or determinations taken, done or made prior to such decision, or to determine the reasonableness, legality or validity of any condition attached thereto, shall not be maintained by any person unless such action or proceeding is commenced and service of summons effected within 90 days after the date of such decision. Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of such decision or of such proceedings, acts or determinations. Any such proceeding shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain and forcible entry and unlawful detainer proceedings.

CALIFORNIA VEHICLE CODE

§ 21. Uniformity of code

Except as otherwise expressly provided, the provisions of this code are applicable and uniform throughout the State and in all counties and municipalities therein, and no local authority shall enact or enforce any ordinance on the matters covered by this code unless expressly authorized herein.

CALIFORNIA CIVIL CODE

§ 3482. Acts under statutory authority not a nuisance

WHAT IS NOT DEEMED A NUISANCE. Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

(Enacted 1872.)

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 338

(j) An action to recover for physical damage to private property under Section 19 of Article I of the California Constitution.

§ 1094.5

(a) Where the writ is issued for the purpose of inquiring into me validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. . . .

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

[Balance of section omitted in printing.]

§ 1094.6

(f) In making a final decision as defined in subdivision (e), the local agency shall provide notice to the party that the time within which judicial review must be sought is governed by this section.

CARLSBAD MUNICIPAL CODE

§ 1.16.010 Time limits for judicial review.

(a) Judicial review of any decision of the city or of any commission, board, officer, or agent of the city may be had pursuant to Code of Civil Procedure, Section 1094.5, only if the petition for writ of mandate pursuant to such section is filed within the time limits specified in this section.

(b) Any such petition shall be filed not later than the ninetieth day following the date on which the decision becomes final. If there is no provision for reconsideration of the decision in any applicable provision of any statute, charter, ordinance, or rule, for the purposes of this section, the decision is final on the date it is made. If there is such provision for reconsideration, the decision is final for the purposes of this section upon the expiration of the period during which such reconsideration can be sought; provided, that if reconsideration is sought pursuant to any such provision, the decision is final for the purposes of this section on the date that reconsideration is rejected.

(c) The complete record of the proceedings shall be prepared by the city or its commission, board, officer, or agent which made the decision and shall be delivered to the party requesting such record within ninety days after he has filed a written request therefor. A request for the preparation of the record of the proceedings shall be filed with the person designated in the final decision. Such person shall, within ten days of such request, notify the party of the estimated costs of the preparation of the requested record. The party requesting such record shall, within ten days of such notification, deposit with the person designated in the decision an amount sufficient

to cover the estimated cost. If during the preparation of the record it appears that additional costs will be incurred, the party requesting such record may be notified and, if requested, shall deposit such additional amounts before the record will be completed. If the cost of the preparation of the record exceeds the amount deposited, the party requesting such record shall pay this additional amount. If the amount deposited exceeds the cost, the difference shall be returned to the party requesting such record. Upon receiving the required deposit, the person designated in the decision shall promptly prepare such record in accordance with the request. Such record shall include the transcript of the proceedings; all pleadings; all notices and orders; any proposed decision by a hearing officer; the final decision; all admitted exhibits; all rejected exhibits in the possession of the city or its commission, board, officer, or agent; all written evidence; and any other papers in the case.

(d) If the party files a request for the record as specified in subsection (c) of this section within ten days after the date the decision becomes final as provided in subsection (b) of this section, the time within which a petition pursuant to Code of Civil Procedure, Section 1094.5, may be filed shall be extended to not later than the thirtieth day following the date on which the record is either personally delivered or mailed to the party or his attorney of record, if he has one.

(e) As used in this section, "decision" means any adjudicatory administrative decision made, after hearing, suspending, demoting, or dismissing an officer or employee, revoking or denying an application for a permit or a license, or denying an application for any retirement benefit or allowance.

(f) In making a final decision as defined in subsection (e) of this section, the city shall provide notice to the party that the time within which judicial review must be sought is governed by this section. Upon giving notice of any decision subject to this section, the person responsible to issue such decision shall include in the decision a statement substantially as follows:

> The time within which judicial review of this decision must be sought is governed by Code of Civil Procedure, Section

1094.6, which has been made applicable in the City of Carlsbad by Carlsbad Municipal Code Chapter 1.16. Any petition or other paper seeking judicial review must be filed in the appropriate court not later than the ninetieth day following the date on which this decision becomes final; however, if within ten days after the decision becomes final a request for the record of the proceedings accompanied by the required deposit in an amount sufficient to cover the estimated cost of preparation of such record, the time within which such petition may be filed in court is extended to not later than the thirtieth day following the date on which the record is either personally delivered or mailed to the party, or his attorney of record, if he has one. A written request for the preparation of the record of the proceedings shall be filed with

_____

(name and address of designated person)

As used in this section, "party" means an officer or employee who has been suspended, demoted, or dismissed; a person whose permit or license has been revoked or whose application for a permit or license has been denied; or a person whose application for a retirement benefit or allowance has been denied. (Ord. 1203 § 1, 1977)

CARLSBAD SUBDIVISION ORDINANCE

§20.20.010 Maps to conform to requirements of planning commission or city council.

All final and parcel maps for major subdivisions shall conform to the requirements of the Subdivision Map Act and this title and also shall conform to the requirements specified in the planning commission or city council resolution approving or conditionally approving the tentative map. (Ord. 9602 § 15, 1981; Ord. 9417 § 2 (part), 1975)

§20.20.020 City council to approve maps.

(a) The city council shall not consider a final map unless there is a valid tentative map for the subdivision.

(b) No final map shall be filed in he office of the county recorder until approved by the city council, but such map shall be disapproved only for failure to meet or perform requirements or conditions which were applicable to the subdivision at the time of approval of the tentative map, providing that any such disapproval shall be accompanied by a finding identifying the requirements or conditions which have not been met or performed. The city council may waive any failure of the map to meet such requirements and conditions if such failure is a result of a technical and inadvertent error which, in the determination of the city council, doesn't materially affect the validity of the map.

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§20.20.040 Grant of open space easement.

In the event that a grant of an open space easement is to be made over any portion of the subdivision, the final map shall contain a certificate signed and acknowledged by those parties having any record title interest in the subdivided land granting such open space easement and stating the conditions of the grant. (Ord. 9417 § 2 (part), 1975)

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§21.54.060 Notices.

Notice of public hearing shall be given as follows:

. . .

(c) Notice of the hearing shall be mailed or delivered at least ten days prior to the hearing to all owners of real property as shown on the latest equalized assessment roll within six hundred feet, or three hundred feet for variance applications, of the real property that is the subject of the hearing. In lieu of utilizing the assessment roll, records of the county assessor or tax collector which contain more recent information than the assessment roll may be used. If the number of owners to whom

notice would be mailed or delivered pursuant to this subparagraph is greater than one thousand in lieu of mailed or delivered notice, the city manager may permit notice to be given by placing a display advertisement of at least one-eighth page in at least two newspapers of general circulation within the city at least ten days prior to the hearing.

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§21.54.064 Applicant's responsibilities.

(a) The applicant for any action requiring a noticed public hearing shall provide the city with a list of persons or entities to whom notice must be given and the addresses of such persons. The applicant shall also provide stamped, addressed envelopes for mailing notice. The list and the envelopes, if required, shall be provided to the city not more than forty-five nor less than thirty days prior to the time the matter is scheduled for hearing. If the number of persons to whom notice would be mailed exceeds one thousand the applicant may, in lieu of providing the stamped, addressed envelopes, provide an appropriate display advertisement. The applicant shall verify the accuracy of the list and the addresses. The secretary of the planning commission or the city clerk shall be responsible for informing the applicant of the date a matter is scheduled for hearing.

(b) The applicant shall pay the cost of providing the notice required by this chapter. (Ord. 9758 § 19, 1985)

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§21.54.120 General plan amendments.

All provisions of this chapter applicable to the amendment of zone classifications shall also apply to amendments to the general plan or to any of the elements thereof.

If the hearings for general plan amendments are held at the same time as hearings for zone amendments under Chapter 21.52, the notice of such hearings may be combined with those required for general plan amendments under this section. (Ord. NS-44 § 2, 1988; Ord. 9379 § 2, 1974)

PART TWO

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COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE FOURTH APPELLATE DISTRICT
DIVISION: 1

Case No. D018305

TITLE

Mass, Thomas A.
v.
City of Carlsbad

SUPERIOR COURT INFORMATION

County: SAN DIEGO CIVO
Superior Court No.: N53303
Superior Court Judge: Murphy
Notice of Appeal Date: January 4, 1993

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DOCKET ENTRIES

1 January 28, 1993
Notice of Appeal Lodged/Received.
Filed January 4, 1993 By Thomas and Janet Mass

2 January 28, 1993
Notice Per Rule S 1 - With Reporter'S Transcript.

3 January 28,1993
Appellate Package Sent

4 January 28, 1993
Docketing Statement Filed

5 March 9, 1993
70 Day Letter Sent (Rule 5.1).
70 Day Date Is March 14, 1993

6 March 15, 1993
Joint Appendix Filed.
3 Volumes of Joint Appendix

7 March 15, 1993
Appellant's Opening Brief Filed

8 April 13, 1993
Respondents Brief Filed.
As To Both Respondents

9 April 13, 1993
****** To Be Assigned ******

10 May 3, 1993
Appellant'S Reply Brief Filed.
B L C - Local Rule 8 - End Notes In Brief

11 May 4, 1993
Case Fully Briefed.

12 May 4, 1993
Oral Argument Waiver Notice Sent.
May 14th

13 May 14, 1993
Request For Oral Argument Filed By:
Appellant - 15 Min

14 May 17, 1993
Request For Oral Argument Filed By:
Respondent - 10 Min (City of Carlsbad)

15 March 29, 1994
Change of Address Filed For:
Counsel For Appellants

16 April 4, 1994
On June Calendar.

17 April 4, 1994
Work, J.
W T N

18 April 28, 1994
Calendar Notice Sent. Calendar Date:
Wednesday, June 8, lg94 @ 1:30 p.m.
W T N

19 May 3, 1994
Received Letter From:
Firm of Mc Donald, Hecht & Solberg - Richard A.
Schulman of the Firm Handling Appeal

20 June 8, 1994
Cause Argued and Submitted.
W T N

21 June 13, 1994
Change of Address Filed For:
Thomas and Janet Mass

22 June 17, 1994
Opinion Filed.
We Affirm the Judgment, Except We Reverse the
Court'S Grant of the Demurrer To That Part of

23 June 17, 1994
Previous Entry Continued.
The Second Cause of Action Which Alleges A
Continuing and Temporary Nuisance Against

24 June 17, 1994
Previous Entry Continued.
Fieldstone During the Construction Phase of the
Development, and We Remand This Matter For

25 June 17, 1994
Previous Entry Continued.
Further Proceedings Consistent With This Opinion.
The Parties To Bear Their Own Costs of Appeal.

26 June 17, 1994
Previous Entry Continued.
Work, Acting P. J., Todd, J., Nares, J.

27 July 1, 1994
Rehearing Petition Filed.
By Appellants

28 July 6, 1994
Order Denying Rehearing Petition Filed.

29 July 6, 1994
Answer To Rehearing Petition Filed.
(moot)

30 July 27, 1994
Record Transmitted To Supreme Court.
1 Volume

31 July 28, 1994
Copy of Petition For Review Received

32 August 8, 1994
Answer To Petition For Review Received

33 August 17, 199A
Telephone Conversation With
Supreme Court - Jurisdiction Date Is Sept. 23, '94

34 August 18, 1994
Received Copy of
Reply To Answer To Petition For Review

35 September 7, 1994
Petition For Review Denied In Supreme Court.
Appellants Petition For Review Denied.
Order File Din This Court Onseptember 9, 1994

36 September 15, 1994
Record Returned From Supreme Court.

37 September 26, 1994
Remittitur Issued.

CASE DISPOSITION INFORMATION

Disposition Date: June 17, 1994
Disposition: Affirmed/Part, Rev/Part, Remanded W/ Direction
Opinion Type: Sign Npub
Disposition Final: (Y = Yes - Blank = No) Y
Notation: Work, Acting P. J., Todd, J., Nares, J.

JUDGES PANEL INFORMATION

Judge Name: Work, Don (J)
Role: Active

Judge Name: Todd, William L. (J)
Role: P
Voted: C

Judge Name: Nares, Gilbert (J)
Role: P
Voted: C

CASE NOTE INFORMATION

NOTES: /
F-6

FINANCIAL TRANSACTION INFORMATION

1 Receipt No:R405521
Void: Fee Type: F Filing Date: January 4, 1993
Attorney Sequence No: 1 Fee Status: A
Pay/Waive Date: January 28, 1993
Debit Amount: .00 Credit Amount250.00
Pay Type: K Check No: 16-66/1220
NOTE:

END OF DOCKET CARD INFORMATION
FOR CASE NUMBER D018305

SUPREME COURT OF THE STATE OF CALIFORNIA

ABSTRACT OF COURT DOCKET

July 26, 1994
Petition for Review Filed

August 8, 1994
Answer to Petition for Review Filed

August 15, 1994
Reply to Answer to Petition for Review Filed

September 7, 1994
In Bank - Appellants' Petition for Review Denied, Justice Mosk, Acting Chief Justice

PART THREE

LENGTHY QUOTATIONS IN SUPPORT OF JURISDICTIONAL ASPECTS OF THE FEDERAL QUESTION INVOLVED

I. Inverse Condemnation

II. Statute of Limitations

III. Denial Of The Civil Rights Cause Of Action §1983 Including Inverse Condemnation And The Cause Of Action For A Writ Of Mandate Based Thereon

IV. If Proceedings, Decisions And Laws Upon Which They Are Based Are Void For Any Reason, They Are Subject To Being Collaterally Attacked. In Such Cases, The Statute Of Limitations Is Not A Defense, Laches Maybe, Not The Statute Of Limitations As A Bar, Never

V. Indemnity, Immunity And Intention

VI. Conflicts

VII. Facts And Issues

VIII. Amended And Supplemental Complaint

IX. Constitution Of The United States Is The Supreme Law Of The Land

I. INVERSE CONDEMNATION

APPELLANTS' OPENING BRIEF

At pages 2-26:

III. DISCUSSION

A. THE TRIAL COURT ERRONEOUSLY SUSTAINED DEFENDANTS' DEMURRER TO PLAINTIFFS' FIRST CAUSE OF ACTION FOR INVERSE CONDEMNATION AND ABUSED ITS DISCRETION IN NOT ALLOWING PLAINTIFFS LEAVE TO FILE ONE AMENDMENT AFTER BASING ITS RULING ON THE BAR OF THE STATUTE OF LIMITATIONS, BOTH OF WHICH ERRORS WERE PREJUDICIAL.

1. THE COURT'S RULING (J.A. 391) THAT "PLAINTIFFS HAVE FAILED TO PLEAD FACTS GIVING RISE TO A CLAIM FOR INVERSE CONDEMNATION" IGNORES OR MISREADS THE ADMITTED ALLEGATIONS OF FACT STATING THAT PRIVATE PROPERTY WAS FOR PUBLIC PURPOSES SUBJECTED TO THE IMPOSITION BY THE CITY OF AN INVASIVE SERVITUDE PERMITTING CONCENTRATIONS OF NOISE AND POLLUTED AIR TO RENDER PLAINTIFFS' HOME UNTENANTABLE.

The United States Constitution, Amendment V, provides, "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation." The California Constitution, Article I, §19 provides, "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner." The basic issues under these provisions involve three questions: has private property been "taken" or "damaged;" was it for a public use; and what is the value of the property so "taken" or "damaged" so as to provide the owner "fair compensation?" The constitutional policy is that injuries caused by public improvements should be spread throughout

the community rather than becoming a burden on the individual. It should be noted that the California Constitution requires compensation not only for "taking" of property, but also for the "damages to property.

In general, the governmental activities which can interfere with or damage property interest are divided into two broad categories: those which are actually physical "taking", including constructive physical invasion or interference with property rights (nuisance-trespass, e.g., low-flying aircraft); and those which cause damage by excessive or improper restriction on property interest by regulations that go "too far" (e.g., economic effect).

California cases have placed less emphasis on the technical aspect of the source of the invasion or interference of property and more emphasis on the nature and extent of the actual harm suffered by the particular plaintiffs relating to their loss of the use and enjoyment of their property and its diminution of value.

The appellants have alleged in all of their complaints by well pleaded facts, all of the essential allegations necessary to state a good cause of action against the respondent-City for inverse condemnation. The complaints make clear that there has been a constructive physical "taking" or "damage" to appellants' protectible property interest. That this "taking" or "damage" was the result of the respondent-City's activity, which was for a public use and purpose, which caused the physical invasion or interference with appellants' property rights.

The test to determine if the physical "damage" or "taking," constructive or actual, has been alleged, may from the cases herein identified be fairly summarized as follows:

(a) substantial impairment or interference with the use and enjoyment of appellants' property and a diminution in its value; or

(b) substantial interference with appellants' use and enjoyment OR a direct, peculiar and substantial burden on their property and an impairment of its value.

The general rule announced in Holtz v. Superior Court of San Francisco, 3 Cal.3d 296, 303, 304 (1970) is that a property owner may recover damages in an inverse condemnation case

where the physical damage is caused to his or her property by public improvements as deliberately planned and built, without proof of negligence, and whether or not such damage is foreseeable. There are two exceptions to the Holtz rule of absolute liability: "emergency use of police power" and a common law "right to inflict damages." Neither of these exceptions are applicable to the case at bar.

In Varjabedian v. City of Madera, 20 Cal.3d 285 (1977) the Supreme Court states with respect to odorous air pollution in connection with inverse condemnation damages said, at p. 294:

> "[I]f the premises were uninhabitable and hence saleable only to an absentee farmer, it appears this factor would appropriately be considered by a prospective purchaser and could properly be included in the estimated decline in market value."

Similarly, a willing and informed buyer would be keenly aware of damage to market value brought about by the impact of the invasive noise, dirt, and noxious air due to the City's change of gate location.

In Varjabedian the trial judge had given as his reason for denying just compensation the plaintiffs' failure to allege "physical damage to the property" or a "trespass". In assessing whether the plaintiffs' allegations served as a basis for inverse liability the Court, at pp. 296-297 (citing more than 15 separate authorities) used the following language which we set forth with citations eliminated:

> "In assessing whether plaintiffs' allegations may serve as a basis for inverse liability, we note that physical damage to property is not invariably a prerequisite to compensation. Rather the determination of the scope of the just compensation clause rests on its construction "as a matter of interpretation and policy". The contending policies which guide that construction have often been described as follows: "on the one hand the policy

underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of public improvements...On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost."

"Several factors present militate in favor of a distribution throughout the relevant community of the type of loss involved here. Plaintiffs' claim stems from the recurring violation of their property by a gaseous effluent. As such, the injury is not far removed from those core cases of direct physical invasion which indisputably require compensation. Thus damage from invasions of water or other liquid effluents often provides the basis for inverse liability. Moreover, plaintiffs' complaint which includes, inter alia, the claim that their land was made "untenantable for residential purposes" is clearly sufficient to depict a permanent and "substantial impairment" in their use of the land."

Of particular significance is the recent case of Harding v. State of California Ex Rel. D.O.T., 159 Cal.App.3d 359 (1984). This Court dealt with the unique damages involved in a situation similar to the facts in the case at bar. In this case the Court of Appeal affirmed the judgment dismissing the nuisance cause of action against the City but reversed the summary judgment as to the cause of action for inverse condemnation. The Court held that the owners alleged unique damage to their property from the noise, dirt, dust, and debris, caused by the construction of a highway, and that therefore they should have been allowed to establish that they suffered a peculiar and substantial burden as a result of their proximity to the highway. On page 367 the Court concluded as follows:

> "Thus, California Courts have extended the peculiar and substantial burden standard to airport noise cases and noxious odor cases. Both these classes of cases at one time required physical taking before compensation was allowed. People suffering damages from their proximity to a highway should not be unequally required to allege and prove a physical invasion." [Citations omitted.]

At page 364 the court states:

> "No taking is required, rather, an action for inverse condemnation requires and invasion of property which directly, substantially, and peculiarly burdens plaintiff to his detriment. (Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal.3d 110, 119-120 [109 Cal.Rptr. 799, 514 P.2d 111].)"

The court pointed out at page 365:

> "Plaintiffs' complaint stated that the prevailing winds collect all of the flotsam of the freeway and deposit it on plaintiffs' property, this being the first open area along the easterly side of the embankment, and that plaintiffs are subjected to dirt, dust, debris and noise, and have lost their access to air, light and view, all making their property virtually untenable. (sic.)"

After reviewing City of Yakima v. Dahlin (1971) 5 Wn.App. 129 [485 P.2d 628], the court stated at page 366:

> "The court found that even though there was no appropriation of property, construction of the overpass would create an echo chamber that would elevate noise levels on Dahlin's property to an intolerable degree."

In the Orange County Flood Control Dist. v. Sunny Crest Dairy, Inc. (imposition of a servitude together with construction), 77 Cal.App.3d 742 (1978), the Court, after reviewing the policy consideration on which inverse condemnation rests and what damages are not contemplated by the Constitution, states on page 756: "But where there has been a substantial impairment of the use which diminishes the market value of the property, compensation is constitutionally compelled." [Citations omitted.]

In Barnhouse v. City of Pinole (damage caused by the construction of a drainage system), 133 Cal.App.3d 171 (1982) the Court at page 197 states the following:

> "With regard to what a plaintiff must show in such a suit, the California Supreme Court has made the following comments: 'The right assured to the owner by this provision of the constitution is not restricted to the case where he is entitled to recover as for a tort at common law. If he is consequently damaged by the work done, whether it is done carefully and with skill or not, he is still entitled to compensation under this provision.'" [Citations omitted.]

The case of Smart v. City of Los Angeles (air craft noise), 112 Cal.App.3d 232 (1980), held that:

> "Plaintiff, although of course entitled to only one recovery, is entitled to several 'bites off the apple' and may proceed with various legal theories in his attempt to prove the City's liability for his damages. Likewise, damages recoverable by a plaintiff in a successful nuisance action for injuries to real property include diminution of the land's value as well as damages for annoyance, inconvenience and discomfort." [pages 239-240] [Citations omitted]

The Court also stated that in inverse condemnation, each action must be examined on its own to determine what results

"justice and fairness" requires; and this is done by focusing on the actual impact of the governmental activity upon the property owner's actual use to determine a taking [citations omitted] [pages 238-239].

Smith v. County of Los Angeles (construction of road caused landslide), 214 Cal.App.3d 266 (1989), is authority for alleging a cause of action for nuisance and inverse condemnation based on the same facts and that damages should include plaintiffs' costs and that the Holtz exception has an extremely limited application.

In Aaron v. City of Los Angeles (1974) 40 C.A.3d. 471; 115 Cal.Rptr. 161, the plaintiffs' evidence proved a measurable reduction in the market values of their homes when noise from aircraft using the City airport caused substantial interference with the use and enjoyment of their property. The Court in commenting upon a landmark United States Supreme Court case, United States v. Causby (1946) 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206, said at 477:

> "Although the flights did not completely destroy the enjoyment and use of the land, they were held to be so low and frequent as to constitute a direct and immediate interference with the full enjoyment of the land, limiting the utility of the land and causing a diminution in its value, and therefore constituted a taking under the Fifth Amendment."

The Aaron Court then continued:

> "In Martin the court held that where the flights in question caused such interference with the use and enjoyment of the property as to result in a measurable diminishment in market value, the government and not the individual homeowner should be required to bear that burden."

When the federal or state governments actually physically take private property and fail to provide the owner with just

compensation, the Courts historically have always provided the owner a remedy. That body of law has not changed but has been extended to apply to a taking that is only a discreet part of the whole even if only temporary, and further, has extended recovery to include cases of "effective" physical appropriation, occupation, invasion of or interference, including air pollution, and thus constitutes a constructive "taking." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); Kaiser-Aetna v. U.S., 444 U.S. 164 (1979); First English Evangelical Lutheran Church, 107 S.Ct. 2378 (1987); Nollan v. California Coastal Commission 483 U.S. 825 (1987); U.S. v. Causby, 328 U.S. 256 (1946).

The Harding case, infra, set forth the requirements for a cause of action at page 367.

The allegations in Plaintiffs' complaint as summarized in the above Summary Of Material Facts state a cause of action under the Fifth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 19 of the California Constitution.[2]

No regulatory taking such as is involved in zoning ordinances restricting the use of land is involved in the case now before the Court.

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[2]It seems advisable to emphasize that plaintiffs' claim for just compensation is made pursuant to rights guaranteed under the Fifth Amendment to the United States Constitution and also rights afforded by Article I, Section 19 of the California Constitution. These two distinct grants of rights differ in wording and at times in the interpretations they receive by the respective highest Courts finally responsible for their judicial construction. As to any such conflicting differences, we have in mind that Article VI of the U.S. Constitution reads: "This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." The supremacy of the federal Constitution is acknowledged and confirmed by the California Constitution in Article III §1.

The language of the Constitutions prohibits the taking of private property for public use without payment of just compensation. The moment private property has been taken whether by formal condemnation proceedings, by physical invasion, regulation or occupancy -- the landowner has suffered a constitutional violation if compensation is not paid.

2. THE COURT'S HOLDING (J.A. 391) THAT PLAINTIFFS FAILED TO ALLEGE FACTS SHOWING THE LOSS OF THE PRIMARY USE AND VALUE OF THEIR PROPERTY WAS PATENTLY ERRONEOUS. IN ADDITION TO OTHER ALLEGATIONS THE PLAINTIFFS ALLEGED THAT THEIR HOME WAS RENDERED UNTENANTABLE.

The court erroneously assumes that this is a regulatory "taking" case. Between the respondents it is. However, out of these proceedings "The City" effected a physical "taking" of the plaintiffs' property. Accepting arguendo that the "taking" of plaintiffs' property was effected by a regulation it still could pass that test and be a compensable "taking."

The articulated guiding principles underlying the courts' "taking" doctrine has been consistent and deceptively simple. The Court has repeatedly stated that the ultimate issue in a "taking" case is whether "fairness and justice" require that compensation be paid for economic injuries caused by the government. Pennsylvania Central Transport Co. v. New York City, 438 U.S. 104, 124 (1978) (Penn. Central).

The court has formulated a series of tests to determine whether considerations of "fairness and justice" require that compensation be paid. These tests are used to provide a structure to review the particular facts of the regulatory "taking" to determine if there has been a compensable "taking" of a protected "property" right or rights. This doctrine requires the court to apply one of three major tests to determine whether governmental action other than a formal exercise of eminent domain power constitutes a taking: the three-factor Penn Central case; the two-part Agins test; and the Loretto per se rule.

Between 1980 and 1987 in a number of taking cases that followed Agins, the court used a one factor test for a land use

regulation that effects a taking on its face and that factor was whether the law "denies the owner economically viable use of his land . . .". The use of the "denial of economically viable use" test as the sole test was short lived. In 1987 the Keystone case "revived" the two-part Agins test.

The use of the single factor test that the trial court used, would result in doing away with the concept of providing compensation for regulatory taking, and even physical taking, unless the claimant alleged loss of all use and value. The trial court with the use of this test would have even denied the Nollans recovery because they could not show the loss of their primary value and use by virtue of public lateral access between their sea wall and the high tide line. In effect, the use of the one factor test, would result in the California Courts returning to their pre-1978 holdings that the owner's remedy was to declare the regulation invalid and not permitting an action for "just compensation," a result prohibited by our Constitutions.

In addition, it was erroneous for the court to rule that it has not been pled that plaintiffs lost the primary use and value of their property when those actual words were used in the second amended complaint and supported by the facts alleged in the first cause of action (J.A. 256: 11-24) (J.A. 253: 14-18) (J.A. 255: 9,10) (J.A. 258: 5-9; 21-23).

3. THE COURT'S RULING (J.A. 391) THAT A TEMPORARY INJURY RESULTING FROM ACTUAL CONSTRUCTION OF PUBLIC IMPROVEMENTS "IS GENERALLY NON-COMPENSABLE" IS NOT APPLICABLE TO THE FACTS ALLEGED IN PLAINTIFFS' COMPLAINT.

Referring to plaintiffs' first cause of action in the second amended complaint, the court ruled (J.A. 391) "A temporary injury resulting from actual construction of public improvements is generally noncompensable" [Citing, People ex rel. Department of Public Works v. Ayon (1960) 54 Cal.2d 217, 228].

In reviewing the allegations contained in the complaint and cause of action referenced, we have found not one allegation

asserting a temporary injury resulting from the public improvements referred to in the court's ruling.

It is true that at page 228 of the opinion in the Ayon case the court clearly states that "Temporary injury resulting from actual construction of public improvements is generally noncompensable." However, on the same page the court points out "It is true that damages resulting from unnecessary and substantial temporary interference with the property owner's rights in the property may be compensable."

Regardless of this quoted language there is no issue raised in the first cause of action which has to do with this question.

The "taking" which results from "The City's" traffic management plan to divert traffic was not even considered by the respondents or the lower court. It must be patently apparent that the injuries caused by the traffic diversion plan will be continuing and permanent (J.A. 265).

In any event, in light of the First English Evangelical Lutheran Church v. County of Los Angeles (107 S.Ct. 2378, 482 U.S. 304 (1978)) holding that even a temporary taking must be compensable, the Ayon case is suspect and must be reexamined.

4. THE TRIAL COURT ERRONEOUSLY SUSTAINED THE DEFENDANTS' DEMURRER TO PLAINTIFFS' FIRST CAUSE OF ACTION FOR INVERSE CONDEMNATION BY IMPROPERLY AND PREJUDICIALLY SPECULATING WHAT STATUTE OF LIMITATION APPLIED AND WHEN THE CAUSE ACCRUED.

(a) The trial court erroneously sustained the defendants' general demurrer by failing to apply the correct standard of judicial review to test the sufficiency of plaintiffs' cause of action for inverse condemnation which was prejudicial.

The sole function of a demurrer is to test the sufficiency of the pleading it challenges. A general demurrer admits the truth of all factual material allegations properly pleaded, as well as the facts essential to a cause of action which the facts alleged supply by implication or inference. Harvey v. Holtville, 271 Cal.App.2d 816, 819 (1969).

The defense that an action is barred by the statute of limitation may be raised only when the ground of the objection appears affirmatively on the face of the pleading or from matters of which the court must or may take judicial notice. C.C.P. §430.30(a); Basin Construction Corp. v. Department of Water and Power, 199 Cal.App.3d 819, 821-823 (1988).

A full and fair reading of the inverse condemnation cause of action demonstrates that nowhere therein does it appear affirmatively on the face of the complaint, or from matters of which the court must or may take judicial notice that the right of action is necessarily barred (J.A. 1: 1-42). Pulver v. Avco Financial Services, 182 Cal.App.3d 622, 635 (1986); Valvo v. University of Southern California, 67 Cal.App.3d 887, 895 (1977).

On the facts alleged, no way does it appear affirmatively that the cause of action for inverse condemnation is necessarily barred by the statute of limitations contained in Government Code §66499.37. Because of this fact it was not necessary for appellants to anticipate defenses in avoidance and in bar of the appropriate statute of limitations. Sullivan v. Shannon, 25 Cal.App.2d 422 (1938); Heyer v. Flaig, 70 Cal.2d 223, 230 (1969).

(b) That based on the facts well pleaded and the clear language of the statute the trial court improvidently and prejudicially applied the wrong statute of limitations.

(1) Objections to defendants' legal argument which are apparent within the four corners of the inverse condemnation cause of action.

In an inverse condemnation cause, the action must be filed within three years of the discovery of the damage (C.C.P. §338(j), while an action based upon a taking of property generally is to be filed within five years of the taking (C.C.P. §§318, 319).

If the "taking" is regulatory, the land owner ordinarily, if a party, must challenge the agency's action through the administrative mandamus procedure (C.C.P. §§1094.5, 1094.6). In the "taking" in our case, the plaintiffs are not a party and it is not regulatory but a physical "taking" by "The City" affecting an

involuntary traffic servitude and by invading and interfering with plaintiff's protected, vested property interest and therefore neither C.C.P. §§1094.5, 1094.6, or Government Code §66499.37 are applicable (J.A. 257: 13-20). The statute of limitation provided for in Government Code §66499.37 is clearly in connection with a regulatory taking under the "S.M.A." and as such is designed to apply to applicants and not non-parties who suffered a physical "taking."

The determination of the applicable statute of limitations period in an administrative mandamus proceeding is complex. However in the inverse condemnation cause standing on its own, it is a clear-cut cause for a physical "taking" of private property by "The City" for a public purpose and should not be confused by going outside the four corners of the inverse condemnation cause of action, and getting involved in the complexities of "statute selection." The trial court assumed facts improperly in selecting and applying the wrong statute of limitations.

The plaintiffs' first cause of action for inverse condemnation has assumed for said action that "The City's" deliberate acts were for the purpose of fulfilling a public object which resulted in "taking" plaintiffs' private property in furtherance of a public objective (J.A. 253; 4-8; 23-28; 254; 27-28; 255; 1-3). That the public improvement, being the traffic diversion plan, was the proximate cause of plaintiffs' injuries (J.A. 253; 23-28; 254; 1-2). "The City" accomplished its intended public purpose of diverting traffic by relocating the access to the new subdivision (at plaintiffs' expense) (J.A. 256; 11-24). The plaintiffs were not parties in the "S.M.A." proceeding only witnesses-objectors. Further, plaintiffs didn't and don't now object to the subdivision itself, but rather avers that the traffic diversion plan implemented by the relocation of the access to the subdivision is the gravamen of their objections.

Accepting arguendo that said §66499.37 is the correct statute of limitations, it does not apply to the plaintiffs' cause of action for inverse condemnation because nowhere (directly or indirectly) in that thirty-two page cause of action does it "challenge" the decision (J.A. 250-262). Yee v. Saualito, 141 Cal.App.3d 917, 920-922 (1983).

When the cause of action "attacks" the proceedings and/or decision said §66499.37 normally would apply. However, if the cause of action "attacks" the decision and also seeks compensation, its application is far from clear. But if, as in the case at bar, the cause of action for inverse condemnation is devoid of any "challenge," directly or indirectly, but merely seeks just compensation, the unambiguous statute clearly is inapplicable. C.C.P. §1858 states as follows:

> "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all."

(2) Objections to defendants' legal argument which are apparent, looking at the record as a whole.

The above defenses to the bar of the statute of limitations can be decided on the facts set forth in the inverse condemnation cause of action (J.A. 1-42) and the clear language of the statute (Gov. Code §66499.37) only. In addition, the plaintiff-appellants assert that the following defenses in bar, avoidance and suspension of said statute should also be considered: equitable estoppel; equitable tolling; special relationship; rule of discovery; fraudulent concealment and judicial suspension. The first two rulings the court stated at the end, it "appeared" that the cause of action was barred. In its last ruling it stated that the cause of action "is" barred (J.A. 631). Appellants read the words "appear" as the same as "seems" or "looks like." That based on the law that "it must appear affirmatively on the face of the complaint that the right of action "is barred, saw no reason to plead anticipatory defenses to the statute of limitations that may be barred. Upon the court making it clear that it thought that the statute of limitations did apply, all subsequent pleadings alleged facts to support defenses in avoidance and in bar of the statute of limitations (J.A. 542).

Plaintiffs' cause of action for a writ of mandate from the beginning, set forth these facts (J.A. 15; 154; 271; 393). The subsequent pleading was not the result of "creative pleading." The reason they were not included in the inverse condemnation cause was because there was no need to do so. It was an abuse of discretion in light of the record not to permit the plaintiffs leave to file an amended complaint. It was the first time the court ruled that the cause was barred. Although the court is not permitted to consider the allegations in the other causes of action in ruling on the demurrer, it certainly should have viewed the whole record to determine if it was not only probable but was it possible that plaintiffs could cure their complaint.

The plaintiffs-appellants will identify these other defenses and key them into the subsequent pleadings where appropriate:

(i) Because of the deception and misrepresentation of the respondents as alleged in the complaint they are "equitably estopped" from pleading the bar of the statute of limitations (J.A. 555; 3-28; 556; 1-5). Kleinecke v. Montecito Water District, 147 Cal.App.3d 240, 245-247 (1983); Neel v. Olney, etc. et al, 6 Cal.App.3d 176, 189 (1971).

(ii) In addition to the doctrine of equitable estoppel, the complaints also set forth facts to support the doctrine of "equitable tolling" and is also applicable. Appellants gave prompt notice and made informal and formal claims upon "The City;" and said respondent was not prejudiced by the delay, and appellants' conduct was in good faith and reasonable (J.A. 258: 15-20). Addison v. State of California, 21 Cal.3d 313, 319 (1978).

(iii) The plaintiffs' complaint alleges facts to show the "special relationship" that existed between the appellants and the respondents. The duty to be imposed on the defendants should be analogous to that of a "fiduciary relationship" (J.A. 555; 3-28; 556; 1-22). Sanchez v. South Hoover Hospital, 18 Cal.3d 93, 101, 102 (1976); Evans v. Eckelman, 216 Cal.App.3d 1609, 1613-15 (1990).

(iv) The "rule of discovery" is applicable to this case and is supported by the facts alleged in the Complaint as aforesaid (J.A. 556; 23-28; 557; 1-6). Leaf v. City of San

Mateo, 140 Cal.App.3d 398, 406-9 (1980); Manguso v. Oceanside Unified School District, 88 Cal.App.3d 725 (1979).

(v) The doctrine of "fraudulent concealment" is also applicable based on the facts in the complaints and the law (J.A. 557; 16-28; 558; 1-11). Pashley v. Pacific Electric Railway Co., 25 Cal.2d 226, 229, 230, 231 and 236 (1944).

(vi) The long and well established "judicial suspension exception" to the bar of the statute of limitation was articulated by the Court in Pierpont Inn Inc. v. State of California, 70 Cal. 282, 293 (1969). The case is on "all fours" with the case at bar (J.A. 258: 15-20) and deserves special consideration.

Plaintiffs' complaints read as a whole set forth well plead facts to support anyone or all of the above identified defenses to the statute of limitations. It was an abuse of discretion not to allow plaintiffs to amend their complaint at least once after ruling that the statute is a bar.

(3) Objections to defendants' legal argument based on the fact that the proceedings, decision and law are null and void, and can be attacked at any time.

Related but being dealt with separately because they are not only different in degree but in kind (III E, pp. 42-47). These objections relate to proceedings and/or decisions that are null and void as being without or in excess of jurisdiction, as well as unconstitutional deprivations and laws that render them null and void; accordingly the defenses based on the doctrines of res judicata, collateral estoppel, and statute of limitations are inapplicable.

At pages 10-21:

III. DISCUSSION

A. THE PLAINTIFFS STATE A GOOD CAUSE OF ACTION FOR INVERSE CONDEMNATION THAT IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

1. Respondents ignore or misread the admitted allegation of facts stating that appellants' private property was "taken" by "The City" for public purposes.

The respondents raise only one substantive defense to appellants first cause of action, inverse condemnation. They claim that the taking was not for "public use."

The record in this case shows beyond any doubt that the cause of the "taking" is based on "The City's" traffic diversion plan and was accomplished by requiring "The Developer" to locate the sole access to the 132 home subdivision across the street from appellants' home.

Appellants think proper to emphasize that "The City" certainly has no protection in the present litigation from the rule stating that "where a city's sole affirmative action is the mere approval of a subdivision map and the issuance of permits it will not be held liable to a claim of inverse condemnation."

In Ullery v. County of Contra Costa, 202 Cal.App.3d 562 at p. 569 (1988), the court indicates a range of liability for inverse condemnation by contrasting the Yox case with other cases.

In the case now here "The City" went far beyond the sole affirmative action referred to in Yox.

"The City" dictated the access change "for traffic safety purposes," 2(J.A. 252, 292). The entire system was a public improvement, for a public use, on publicly maintained property. The respondents were successful in persuading the trial court of many of their arguments. However, the trial court in the order appealed from did not use appellants' defense of "no public use" as a reason for sustaining the demurrer.

The respondents base their argument on a false premise. They assumed their facts and not the facts as alleged in the complaint. Further, if they raised them in their answer as they should, the facts would be refuted by those alleged in the complaint.

The complaint alleges that the cause of the appellants' injuries were "The City's" traffic diversion plan, and locating the access was merely a means to accomplish their end. This is clearly a public purpose and use. "The City" was unconcerned about the private entryway, only its location to control traffic.

2. The trial court erroneously and prejudicially sustained the defendants' demurrer to appellants' first cause of action for inverse condemnation by improperly speculating what statute of limitations applied and applying it improvidently.

The trial court used the wrong standard of review in determining that the statute of limitation contained in Government Code §66499.37 applied to the case stated in the complaint (A.O.B. 18-26) (infra pp. 1-4).

3. The contemporary standard of "takings" under the law in regulatory "taking" confirms that appellants state a good cause of action for inverse condemnation.

Appellants have stated that: "Accepting arguendo that the 'taking' of the plaintiffs' property was effected by a regulation, it still could pass that test and constitute a compensable 'taking'" (A.O.B. 15). The appellants thereafter reviewed the law of regulatory taking (A.O.B. 15-17).

From the above summary it is fair to say that in regulatory taking law the general rule is that when the government takes property for public purposes the private landowner is entitled to just compensation. In Lucas v. South Carolina Council, 505 U.S.--, 120 L.Ed2d 798, 112 S.Ct. 2886 (1992), the court narrows the longstanding "police power" exception to this rule.

The opinion also makes clear that if the landowners can prove that their distinct and reasonable investment-backed expectations were substantially invaded or interfered with by a

public entity, or a public entity permitting others to do so, the public entity will be constitutionally compelled to pay for the taking.

It is beyond argument that California has a long tradition of protecting a person's right to exclusive possession, use and disposition. Gregory v. San Juan Capistrano, 142 Cal.App.3d 72, 87-90 (1983). Two out of the three principle protected property interests have been taken and the right of alienation significantly affected.

The plaintiffs in the case at bar have vested protected property interests. The factual allegations in the complaint support the conclusion that their reasonable investment-backed expectations as to their use and enjoyment of them were all taken from them.

The United States Supreme Court's definition of property in the great bulk of the cases where the definition of property is at issue, has defined "property" as economically valuable rights created by positive law. For example, in United States v. General Motors Corp., 323 U.S. 373 (1945), the Court stated that property for "taking" clause purposes consists not of the tangible thing itself, but rather of certain "rights recognized by law" with respect to that thing. The following is a passage that is frequently cited in the Court's "taking" decisions (pp. 377-8):

> It is conceivable that [the term 'property' in the taking clause] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relationship to the physical thing, as the right to possess, use and dispose of it. In point of fact the construction given the phrase has been the latter."

This definition was quoted with approval in Agins v. Tiburon, 24 Cal.App.3d 266, 273 (1979). In a procedural due process case (as distinguished from a taking clause case) the

Court states that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

The Lucas opinion makes explicit what has been acknowledged time and again by the Court that the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with the distinct "investment-backed expectations" are keenly relevant to takings analysis. The key is that you must look at the property being regulated, rather than the property as a whole, and this, from the claimant's point of view. In this connection the court will take judicial notice that it is possible to live in an untenantable house.

Thus in both types of cases the Court has treated intangible, economically discrete interests as protectable property rights and compensable if "taken." The Lucas court in its footnote 7 on pages 813 and 814 focuses on the definition of property. It states:

> "Regrettably, the rhetorical force of our 'deprivation of all economic feasible use' rule is greater than its precision, since the rule does not make clear how the 'property interest' against the loss of value is to be measured."
>
> "The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State law of property, i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which, the takings claimant alleges a diminution in (or elimination of) value."

On a different but related issue is the question of property as a vested right. It is clear that when the government grants a legal right it can be subject to expressly or implicitly reserved power to change the law. Under those circumstances, if the

government takes that right back, the claimant has not lost any "vested right."

Respondents' argument that appellants' property rights are not "vested rights" is misplaced. Appellants' rights to possession and use of their property is based upon the positive law of California and is not subject to any express or implied power in the government to take those rights away. C.C. §654; Gregory v. San Juan Capistrano, 142 Cal.App.3d 72, 87-90 (1983). Any such effort to do so would be in violation of the Constitutions based on the positive law as well as our normative standards.

"The City" together with "The Developer" created an environment which the plaintiffs relied on and with justification. The name of the street was changed to Corte de la Vista, "the street of the view." The plaintiffs invested substantial sums into their home to make maximum use of their location and make it adaptable especially to their lifestyle. The primary use and value of their property has been destroyed by air pollution caused by the diversion of traffic. The plaintiffs' protected, valuable property interests were taken from them in violation of the United States Constitution and its laws and the California Constitution and its laws.

Appellants anticipated prior to buying and improving their home that the adjacent property would be subject to a residential subdivision. They do not claim that the development was unexpected. However, their claim is not directed to the fact of the subdivision itself, but rather avers that the particular details of the existing traffic control plan, specific plan, and the general plan, were all relied on by appellants.

In Topanga v. County of Los Angeles, 11 Cal.3d 506, 517, the court states:

> "A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare." (Citations omitted.)

Appellants have sustained damages by the unjustified, unexpected and unconstitutional variance of the traffic control plan. The funneling of the traffic to a 132-home subdivision into one access located across the street from their home, subverts the critical reciprocity upon which community planning regulations rests. The traffic diversion plan also effected a compensable "taking" of a traffic servitude.

Civil Code §654: "The ownership of a thing is the right . . . to possess and use it to the exclusion of others . . ."; Duckett v. Adolph Wexler Bldg. & Finance Corp., 2 Cal.2d 263, 265 (1935). "The landowner's property right to exclude the use and possession by others is one of the most essential sticks in the bundle of rights that are commonly characterized as property." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

The respondents cite Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal.3d 785 (1976) to support their argument that "appellants have no vested rights in zoning." They confuse appellants' rights in "possession and use" with a claim for a "vested right in zoning."

Next respondents confuse appellants' reliance on their reasonable investment-backed expectations, "as reliance on zoning." Appellants have not claimed a "vested right in zoning." Appellants' complaint alleges that they did rely on "The City's" general and "The Developer's" specific plan as well as the existing ideal residential environment of their location, 2(J.A. 254; 926). This is not reliance on zoning, as a vested right, but it does constitute a major element of their reasonable investment-backed expectations. "The City's" traffic control plan was designed and implemented in violation of the general plan, 2(J.A. 400: 26-29; 408: 10-14). It also was beyond "The City's" authority and jurisdiction (A.O.B. 42).

Lastly, respondents confuse the distinction between traditional "vested rights" in property, and a developer's "vested rights" which is based on the principles of estoppel. The respondents' Avco case on pages 791-793, dealt with "The Developer's" species of "vested rights" and has no application on this point. (It does however have application to show that "The

Developer" never acquired a vested right until after the hearing on the final map and even after this lawsuit was filed, 2(J.A. 407: 11-18).)

This small selection from respondents' brief, on this one point, is in microcosm the technique used throughout their briefs and pleadings. It must be obvious that it contains: respondents' "facts" and not the facts alleged in the complaints; spurious arguments that obfuscate the real issues; and cite cases of two kinds, those that are clearly distinguishable, and those that have some relevancy. In the latter category it will be found that those cases support appellants' case and not theirs. Because this has been a pattern, it is difficult to explain as a lack of knowledge.

Appellants have attempted to restrain themselves from littering their brief with like examples. This for two practical reasons: One, they wished to use the space available to develop their case in a positive manner; and two, the courts understandably don't approve. Accordingly, appellants will not pursue this further, unless the Court so orders.

If the landowners can prove that all of a discrete part of their property was "taken," they may have a compensable "taking" under the Constitution if this discrete part was (a) a vested, protected property right, and (b) denies "economically viable use and/or their reasonable "investment-backed expectations," and (c) that it destroys or substantially damages the landowner's interest in their property. The primary consideration is the effect on the individual's use of the property from his perspective.

"The City" improperly appropriated a traffic servitude on plaintiffs' property. The plaintiffs' vested, protected property interests have been invaded and interfered with. The right to possess and use, to the exclusion of others, has been destroyed. The loss of the "personal sanctuary" aspect of their home is both a substantial and significant loss to appellants and also destroyed their reasonable investment-backed expectations.

> "The plaintiffs purchased their home to enjoy the out-of-doors living and comfortable indoor living

without air-conditioning, and both features have been substantially and significantly damaged and/or destroyed by the defendants and each of them as herein alleged." 2(J.A. 258: 5-9)

"The plaintiffs have incorporated a group of photographs into their group Exhibit B1-20 which demonstrates in a tangible and concrete manner that what has been alleged as the reason for their purchase and subsequent improvements was not an after-thought but was a distinct investment-backed expectation." 2(J.A. 258: 10-14)

Harding v. State of California ex rel D.O.T., 159 Cal.App.3d 359 (1984) has substantially the same facts and issues as the case at bar. It held on page 367 that:

"Thus, California courts have extended the peculiar and substantial burden standard to airport noise cases and noxious odor cases. Both these classes of cases at one time required physical taking before compensation was allowed. People suffering damages from their proximity to a highway should not be unequally required to allege and prove a physical invasion (see Comment, The Highway Cases: Noise as a Taking or Damaging of Property in California (1980) 20 Santa Clara L.Rev. 425).

Plaintiffs in this case have alleged unique damage to their property from dust, debris and highway noise. As the court held in Varjabedian, they should be allowed to establish that they suffered a peculiar and substantial burden as a result of their proximity to the highway. The substantiality of the interference may be determined by use of modern measurement techniques as in airport noise cases or by testimony regarding the actual physical invasion of their property by dust and debris as in Varjabedian.

> Thus, compensation must be rationally related to the degree of harm suffered and will not be dependent upon an arbitrary standard that is tied to a physical appropriation or chance location of plaintiffs' property."

"The City's" constitutionally improper appropriation of a traffic servitude effected an out and out "physical taking" without paying just compensation. The cost must be divided equally and paid for by the entire community.

We are told that dissenting opinions are enlightening but are not to be cited in briefs. Effective Appellate Advocacy, by Frederick Bernays Wiener, 1950, Prentice-Hall Inc. Because Justice Brennan's unique 25 page dissenting opinion in San Diego Gas & Electric v. San Diego, 450 U.S. 621 (1981) was, when rendered, the "constructive" majority opinion on the merits of the case, and further, because it was the precursor of First English and Nollan, infra, and their progeny, which have been a self-fulfilling prophesy, an exception to the rule is defensible. (Justice Brennan's opinion).

> "Police power regulations such as zoning ordinances and other land use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property." (Page 652.)

> "In my view, once a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just compensation for the period commencing on the date of the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." (Page 653.)

"Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable." (Page 657.)

"That guarantee was not designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be born by the public as a whole." (Page 656.)

APPELLANTS' PETITION FOR REHEARING

At pages 5-13:

I.
DUE TO THE RESPONDENTS' WRONGFUL USE OF ITS "SPEAKING" DEMURRER, THEY HAVE DEVELOPED THEIR OWN SCENARIO THAT IS INCONSISTENT WITH THE FACTS IN THE COMPLAINT. THIS INDUCED THE COURT'S MISUNDERSTANDING OF THE FACTS. THIS IS THE MAJOR ERROR AND ALL OTHER ERRORS STEM FROM THIS FALSE PREMISE. THIS IS TRUE OF THE COURT'S RULING ON APPELLANTS' INVERSE CONDEMNATION CAUSE OF ACTION

The root cause of all the Court's errors can be traced to the scenario that Respondents have fabricated. The proceedings in the lower court were all in the motion court and were presided over by the Honorable Thomas R. Murphy. This court, more than most courts, carries an extraordinarily heavy case load. Based on many appearances before Judge Murphy, it is clear that he is by nature well suited to perform the judicial functions of this Court and his demeanor manifests it. It was also apparent from his questions and statements that he possesses an honest bias for government in connection with claims like the Appellants are making.

Because of the trial court's seeming predisposition in favor of the City in cases like this, together with the heavy case load, it

may be susceptible to being persuaded to adopt Respondents' scenario of the facts as an honest mistake. This error would have the added advantage of leading to the conclusion desired. It is readily admitted that to read the voluminous pleading,[1] is most time-consuming, tedious and boring. Add to this, all of the motions and briefs associated with ruling on these pleadings, it is understandable that Courts may consciously or unconsciously rely on "facts" presented by the party they believe to be right.

Under the rules, for the purposes of reviewing a complaint, it must be assumed that all facts alleged are true. The Court cannot permit itself to be wrongfully influenced by the Respondents' "facts" and must be vigilant that they do not fall into this trap. This is all the more important when to rely on Respondents' "facts" will result in doing an irreparable injustice.

Respondents' techniques of repeated clichés, based on generalities of facts and laws that are inconsistent with the facts and law in Appellants' case (and also not true in fact) is reminiscent of the technique used by Joseph Goebbels. For those lucky enough not to be that old, he was Hitler's propaganda minister and confidante. His policy was based on the notion "that a lie, repeated often and forcibly, gains the legitimacy of truth." Appellants fear that the trial Court was victimized by the use of this technique and that this Court may be also, if not called to their attention.

A few examples of Respondents' "clichés" should suffice to demonstrate and identify their use in their briefs. These are not quotations but merely fair paraphrased generalities of Respondents' "clichés."

1. You had notice and you had a hearing and you are barred because you failed to seek judicial review.

2. That all your common law, statutory and constitutional Causes of Action are barred because they are based on the city's

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1 Appellants Second Amended Complaint for Counts I and II and the Third Amended Complaint for Count III as well as the Amended and Supplemental Complaint.

approval of the proposed subdivisions and you failed to seek judicial review in a timely fashion.

3. Appellants do not have recognized property rights or constitutional rights.

4. Plaintiff expected no interference with their view.

5. Plaintiffs cannot rely on zoning.

6. Plaintiffs are obstructing "land use planning" by the misuse of defenses in bar of the statute of limitations.

7. Plaintiffs objected to the subdivision.

These and like statements are inconsistent with the facts in the Complaints. Where cases are cited in support of the statements, they are not applicable to our case and the few that may be applicable, support Appellants' case.

Appellants respect the Court's reluctance to be involved in disputes like this between attorneys. Be assured, Appellants also find it most distasteful. Further, it has not been motivated out of malice or a desire for retribution. We know of no other way to alert this Court of Appellants' fears that they may also be unknowingly misled.

The Court's opinion, on page 7 states in part:

> . . .that the action causing the alleged taking or damage to the Masses' property is the private property development by Fieldstone.

With all due respect, Appellants believe that this statement misstates the material facts as alleged in their complaint. More particularly, without limiting the generality of the foregoing, the Court's attention is called to the Planning Commission's meeting of October 3, 1990, page two, third paragraph 2 (J.A. 292) which provides as follows:

The project is proposed as a gated community. The gate design is single access off Corté de la Vista and it provides a turnaround area at the entrance. The location of the single access was dictated by staff. The original proposal came in with an access off Alicante Road; however, for traffic safety purposes, staff requested that the entrance be moved to Corté de la Vista.

The relocation of the access gate to the proposed subdivision was merely the means to accomplish the City's objective of regulating traffic for "public safety purpose" and this on its publicly owned, constructed and maintained streets 1 (J.A. 33). The diverting and funneling all this high volume of traffic (from 132 single, family homes) just across the street from the Appellants' residence, resulted in a public taking, for a public purpose, for a public use and all on public property as alleged in their Complaint 2 (J.A. 250-300).

Fieldstone's proposed subdivision, including the access gate, is indeed private property. However, if the Complaint is given a reasonable interpretation, reading it as a whole and its parts in their context, then Fieldstone caused no inverse condemnation taking or damages. (The Appellants' claim against Fieldstone is limited to two Causes of Action based on negligence, causing nuisance-type damages as set forth in Count II of their Complaint 2(J.A. 260-270).) The Complaint also makes clear that Appellants had no objection to the proposed subdivision. Nor does the Complaint allege that private property, including the gate, caused the taking.

The substantial, immediate, direct and proximate cause of Appellants' damage is the diversion and funneling of the traffic which was accomplished by the city by "requesting" that the entrance be moved to Corté de la Vista 1 (J.A. 33).

Respondents' demurrer admits all material facts properly plead and in addition, the city has removed all doubt by explicitly admitting that "the location of the single access was dictated by staff "for traffic safety purposes...." 2 (J.A. 292).

The traffic diversion was the "public improvement" for traffic safety purposes for the benefit of the public as a whole. Thus, the admitted facts show that the City, acting in furtherance of public objectives, took and/or damaged Appellants' private property without just compensation. The Appellants should not be made to suffer a disproportionate burden for the benefit of the public as a whole.

The case of Yee v. City of Sausalito (1983) 141 Cal.App.3d 917, is, by compelling analogy, opposite to our case and is most persuasive.

In the Yee case, the property owner brought an action against the City for inverse condemnation alleging that, a public improvement, namely, a storm drain system for diverting rain water and used as deliberately planned and designed, was the proximate cause of the taking of their property. The trial Court granted the City's motion for summary judgment and the Court of Appeal reversed.

The Court held that the Appellants had stated a valid cause of action for inverse condemnation since the public safety purpose of the plan was served. In so holding, the Court applied the rule that inverse condemnation is the remedy for injury to private property where the damages are proximately caused by a public improvement used as planned.[2]

In our case, the city's traffic diversion plan, adopted for a "public safety purpose" and this public safety improvement being used as planned and designed is the proximate cause of Appellants' injury. The fact that the traffic diversion was not designed or planned to take Appellants' property is irrelevant. It fulfilled the objective of public safety and at the same time was the proximate cause of Appellants' injury. The Yee Court states on page 920:

> The fundamental justification for inverse liability is that the government, acting in furtherance of public objectives, is taking a calculated risk that private property may be damages. (Citations omitted.)

In our case, the public purpose served by the traffic diversion plan was to "collect and convey" the traffic from Alicante Road and funnel it to a point across the street of Appellants' home. The injury is occurring in increasing increments as the development is being constructed and occupied. The traffic diversion for public safety is also

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2 The record in the Yee case is not clear but it can reasonably be presumed that the collection of rain water included run offs from private evelopments. Based on Respondents' reasoning, they would argue that the private developments were the proximate cause.

functioning as deliberately planned and designed. The Appellants are being injured as a proximate cause of the public improvement.

The fact that our case arises out of acts and conduct taken by the City in connection with its land regulation duties does not nor can it be constitutionally construed that the Subdivision Map Act (S.M.A.) supplants the common law remedy of "inverse condemnation" or provides a governmental immunity.[3]

Lacher v. The Superior Court of Orange County (1991) 230 Cal.App.3d 1038, 1050, 1051 (Lacher). Nor did it amend the constitution, prohibiting the taking of private property for a public use or purpose without full and fair compensation. Further, neither the Planning and Zoning Laws (Government Code, §65000 et seq.) nor the S.M.A. (Government Code, §66410 et seq.) which cover governmental approval of real estate development apply to physical taking cases but only to regulatory taking.

The complaint alleges a physical taking case. The complaint in the Yee case for inverse condemnation is substantially the same in all material respects and the Yee Court ended its opinion by stating on page 923:

> Based on the record before us, the Appellants have stated a valid cause of action for inverse condemnation and should be allowed to proceed to trial on the merits, subject to all available defenses.

Because of the law and logic of the Yee case, this Court is respectfully urged to follow its holding.

The Court's reliance on the Ullery v. County of Contra Costa (1988) 202 Cal.App.3d 562 (Ullery) and Yox v. City of Whittier (1986) 182 Cal.App.3d 347 (Yox), as being opposite to our case does not bear up upon close scrutiny. The Court's statement on page 7 of its opinion that:

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3 Under the umbra of its duties relating to the approval of subdivisions, there is no governmental immunity for inverse condemnation liability.

> If Fieldstone's initially proposed map had reflected the access gate location on Corté de la Vista and the City had merely given broad approval of the map without requiring any changes, the rule of the Ullery and Yox cases would undoubtedly apply as the City would have merely approved the subdivision map.

The Court's statement tacitly admits that the cases are distinguishable. In extending the Ullery-Yox holding, the Court has created a new and huge immunity to governmental agency. The Court, in its opinion on page 8, concludes that, any and all, "conditions or requirements" imposed by the government in connection with approval of subdivision maps, do not constitute "public" uses or purposes which would subject the government to inverse condemnation liability. It was an error to rule on this issue because that issue was not proposed or briefed by the parties. The Subdivision Map Act (S.M.A.) cannot bar a homeowner's action for inverse condemnation even if provided for by the legislature explicitly. Lacher, supra, and Horn, infra. Both Harding, infra and Yee, sufra, would find that the Complaint herein states a good cause of action. 1 (J.A. 33), 2 (J.A. 398).

The following statements, made by the Court in its opinion, are errors owing to a mistake of law and/or a misunderstanding of the facts:

(a) Private property caused the taking and the damages. (Not so; it was the traffic diversion.)

(b) The City cannot be liable for inverse condemnation for merely relocating the access gate on private property. (Under the Constitution, the City cannot take private property for a public purpose without just compensation.)

(c) The only alleged involvement of the City was its approval of the subdivision map. (Not true; it adopted and approved a traffic diversion plan for public purposes that took and damages Appellants private property, without compensation.)

There is a close nexus between the traffic diversion plan and the injuries sustained by the Appellants. For the Court to hold that "the City's conditions" was not a "public taking" is to confuse means and ends. The end was traffic diversion for the public safety. The means used was the relocation of the access gate. The tail does not wag the dog.

It is prejudicial error for this Court to affirm the trial Court's order, sustaining the Respondents' Demurrer to the Complaint for inverse condemnation, based on the reasons advanced by the trial Court and its own independent reasons.

SUPPLEMENTAL PETITION FOR REHEARING AND/OR REPLY BASED ON EGREGIOUS MISSTATEMENTS OF FACTS AND TO BRING TO THE COURT'S ATTENTION THE U.S. SUPREME COURT OPINION FILED ON JUNE 24, 1994

At pages 1-4:

I.
SUPPLEMENTAL JUSTIFICATIONS FOR THIS FILING AND GRANTING A REHEARING

1. RESPONDENTS' NOTORIOUS EGREGIOUS MISSTATEMENTS OF FACT.

Respondents' misstatements of facts are so substantial and significant that the Court will find the attached "index" helpful to ferret them out. This should set the record straight.

2. NEWLY DISCOVERED CONTROLLING AUTHORITY.

The decision in the Dolan v. City of Tigard ("Dolan"), 94 D.A.R. 8803 (6-24-94), was entered only days prior to Appellants' filing their Petition for Rehearing. Appellants' inverse condemnation case is based on a "physical" taking, however, in this context it is a distinction without a difference. A copy of the opinion is attached hereto for the Court's

convenience. Appellants respectfully submit that it is controlling in this case.

3. RESPONDENTS SUGGEST SANCTIONS AGAINST APPELLANTS IN THEIR ANSWER.

The Appellants deny that they reinserted material that the court had ordered removed. The trial court denied Respondents' request for sanctions. The Respondents did not appeal that order and that matter is *res judicata* and it is improper to raise the issue.

II.
ARGUMENT

The points and authorities in support of Appellants have been completely and clearly, covered in their complaints and briefs and will not be repeated here. The nature and extent of the Respondents' misstatements of fact have only recently been discovered. Respondents' answer, with its tangential issues have compounded and aggravated the situation. In addition to the authority cited in the Petition, indemnification contract, even if otherwise legal, cannot extend to damages in inverse condemnation. Kramer v. City of Los Angeles, (1972) L.A.S.C. 993, 728 and Greater Westchester Homeowners Association v. City of Los Angeles (1970) L.A.S.C. 931, 989. The justification for bringing the Dolan case to the Court's attention is self-evident.

III.
CONCLUSION

Time limitations prevented a more detailed index. No guide will be a substitute for reading the complaints. Only then will it become apparent that Respondents "facts" are inconsistent with the facts alleged by Appellants. If the facts are given the maximum of judicial review, with independent judgment, as a *de novo* proceeding it will show that Appellants' contentions are supported by the law.

The Second Amended Complaint, the Third Amended Complaint for the Third Cause of Action and the Amended and Supplemental Complaint 3(J.A. 542-576) are all part of the record and set forth all the facts in this case. Given "...a reasonable interpretation, reading it as a whole and its parts in their context, constitutes the 'facts' in this record." They will speak for themselves.

The record shows that the executive branch of the City and its legislative branch together with the state legislature have failed in protecting Appellants' property and civil rights under our constitutions. If the judiciary fails to protect the Appellants and other contiguous homeowners from the wrongful deprivation of their property and constitutional rights, to whom do they turn?

Developers believe it is expedient to crush any neighbor homeowners that challenge their proposed subdivision. The merits or the size of the claim is irrelevant to them. They feel they must punish "NIMBYS," seek sanctions every step of the way, and make them sorry they ever dare to file a suit against them and make an example of them. The understandable result of this policy is that it is financially inexpedient for these homeowners to seek a judicial remedy. As a practical matter, the courthouse doors are closed to them.

We are inherently vulnerable and unrepresented in our government. The votes of this group are not substantial and significant enough to have any effect. Are we to merely suffer silently, these injustices? Or do we join the growing number who are cynical and distrustful of our government and have a contempt for all government? Are these the types of deprivations and humiliations that Thomas Jefferson had in mind when he drafted these words:

> But, when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty to throw off such government, and provide new guards for their future security. The Declaration of Independence, July 4, 1776.

PETITION FOR REVIEW OF DECISION
BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT [DIVISION ONE]
FILED JUNE 17, 1994

At pages 5-13:

A. THE COMPLAINT STATES A GOOD CAUSE OF ACTION AGAINST THE CITY FOR INVERSE CONDEMNATION.

1. The Complaint alleges the taking of private property for a public use and purpose, without compensation.

2. SMA defenses, including the statute of limitations are not applicable to non-parties, non-regulation taking.

3. Taking that results from legislative and quasi-legislative action has a more restrictive test than those that arise out of adjudicatory proceedings.

4. The test for a regulatory taking is also stricter than a physical taking.

5. There is also a distinction between a use restriction and the taking of a protected interest in property.

6. Both federal and state law support the allegations of the Complaint that Appellants have protected valuable property rights that have been taken by the traffic easement.

Authority in support of this heading and its subheadings are grouped together for the convenience of the Court[4].

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4 Holtz v. Superior Court of San Francisco (1970) 3 Cal.3d 296, 303,304; Varjabedian, infra; Harding, infra; United States v. Causby, infra; First English, infra; Nollan, infra; Lucas, infra; Dolan, infra; United States v. Orito (1973) 413 U.S. 139, 142 ("The Constitution extends special safeguards to the privacy of the home.")

II. STATUTE OF LIMITATIONS

APPELLANTS' OPENING BRIEF

At pages 38-47:

D. TRUNCATED LIMITATION PERIODS REQUIRED NOTICE TO PLAINTIFFS TO BE CONSTITUTIONAL.

"The City" had no intent and made no effort to afford the plaintiffs a C.C.P. §1094.5 type of hearing. This is confirmed by the trial court's conclusion that plaintiffs' writ of mandate action is not an administrative mandamus action but an ordinary mandamus action pursuant to C.C.P. §1085. In that case, plaintiffs as non-parties to the proceeding between the respondents would not be bound by the ninety day statute of limitations contained in C.C.P. §1094.6(b) or the statute of limitation period contained in Government Code §66499.37 of the "S.M.A." Thus plaintiffs' actions would be controlled by the three year or five year statute of limitations.

C.C.P. §1094.6 provides for judicial review of a decision by a local agency pursuant to C.C.P. §1094.5. Plaintiffs do not appear to be within the class of persons who are subject to either the benefits or limitations therein provided for. However, in light of the recent holding in El Dorado Palm Springs, Ltd. v. Rent Review Commission, 230 Cal.App.3d 335, 344-348 (1991) ("El Dorado") and on analogy to its reasoning, it has an impact on issues subject to this Court's review.

The parties in the El Dorado case agreed that C.C.P. §1094.6 governs the timeliness of filing the cause of action for a writ of mandate ("W.O.M."), that the "W.O.M." was filed more than ninety days after the written decision was issued and that the respondent never gave El Dorado direct notice of the time within which judicial review must be sought. The parties did disagree as to whether the cause was filed in a timely manner under the set of circumstances before the El Dorado Court. The court held that the period was tolled by failure of the respondent to comply with the notice requirement of C.C.P. §1094.6(f).

The El Dorado court held that the writ of mandate cause of action was not barred by the ninety day statute of limitations set forth in C.C.P. §1094.6(b). In arriving at their decision they reviewed the background of the legislation and quoted liberally from Hittle v. Santa Barbara County Employee's Retirement Assn, 39 Cal.3d 374, 386-387 (1985) and Cummings v. City of Vernon, 214 Cal.App.3d 919, 922-923 (1989). They found that prior to the enactment of §1094.6, judicial review of administrative mandamus was subject to the general statutes of limitations and that was three or five years unless otherwise specified. For good and valid reasons the Legislature gave local agencies the option of adopting a ninety day limitation period. However, the Legislature considered it vitally important that parties be notified that a ninety day period is applicable, instead of a three or five year period. Since §1094.6 benefits local agencies by reducing the statute of limitations, it requires local agencies to assume the "burden" and give notice of this fact. At page 346 of its opinion, the El Dorado court concluded that the ninety day statute of limitations provision be read so that the said limitation period be tolled until such time as the "subdivision (f) notice" is given. Considerations of fairness and constitutional due process dictates that direct notice be given to the aggrieved persons of the truncated statute of limitation resulting in a drastic reduction of time from three or five years to three months. The Legislature required local agencies to give notice of the truncated statute of limitations, the Courts should require the Legislature to do the same.

The case at bar provides this Court the opportunity to provide remedial relief from the limitation period in Government Code §66499.37 of the "S.M.A." It can find that the Legislature impliedly intended to toll the ninety day limitation period until such time as notice of it was given. It could, in the alternative, hold the truncated statute of limitations to be unconstitutional because the Legislature failed to expressly provide for direct notice of the drastically reduced period (see supra, denial of due process III C 1 (a) and (b)). Also, the court could instead steer a middle course and apply any one or more of the plaintiffs' defenses to the ninety day statute of limitation

set forth herein under III A 4 (a) and (b). The respondents never gave the plaintiffs-appellants notice of the time within which judicial review must be sought (J.A. 401; 10-25). This is all the more egregious because "The City" gave this notice to other persons who had less substantial and significant interest at risk (J.A. 409: 1-10; 500; 501), and also because the plaintiffs-appellants requested this information and never received an answer (J.A. 401: 8-25). The fundamental basis of "The City's" duty to notify plaintiffs is the fact that they knew that plaintiffs' vested and substantial rights were involved. They also knew that the plaintiffs were entitled to proceedings that were adequate to meet constitutional standards including notice of the decision and the time within which to seek judicial review and the consequences for failure to do so in a timely manner. This constitutes a flagrant denial of plaintiffs' due process and equal protection constitutional rights and treats plaintiffs and contiguous property owners as (NIMBY's)[4] and second class citizens (J.A. 404: 25-28; 405: 1-2) (J.A. 407: 1-6) (J.A. 409: 1-10) (J.A. 411: 3-12) (J.A. 415: 16-26).

Today, in light of contemporary judicial approval of the doctrine of "tolling," in truncated statute of limitation cases and by the Legislature's intent implicitly as well as explicitly being expressed by the amendments of 1991, recognizing these cases; and based on analogy to the reasoning for the requirements of §1094.6(f) that the local agency shall provide notice to the aggrieved person that the time within which judicial review must be sought, this Court should apply the same standard to §66499.37 of the "S.M.A.", and a fortiori to a non-party contiguous owner- objector who gave notice of their interest even before the hearings and the decision and were eclipsed from all their property and constitutional rights.

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[4]An uncomplimentary nickname used by land developers and land-use governmental agencies; an acronym consisting of the first letter in "not in my back yard."

E. STATUTE OF LIMITATIONS DEFENSE IS NOT A BAR TO NULL AND VOID PROCEEDINGS, DECISIONS AND LAWS.

The plaintiffs have alleged that their constitutional rights to due process was denied to them by "The City" (J.A. 416: 7-24) and by the provisions of Government Code §66499.37 of the "S.M.A." containing a truncated statute of limitations (infra, III D, pp. 38-42). Plaintiffs have also alleged that "The City" in diverting the traffic by the means of relocating the gate engaged in traffic management (J.A. 412: 1-12) and thus acted without jurisdiction (J.A. 484: 16-26). In cases where the government denies procedural or substantive due process or acts without jurisdiction, its acts are a nullity and the statute of limitation cannot be raised as a bar. Proceedings, decisions and laws that are null and void can be collaterally attacked in any proceeding and at any time subject only to the defense of laches. City and County of San Francisco v. Padilla, 23 Cal.App.3d 388, 400 (1972).

Even if the government required as a condition, certain procedural limitations to challenge unconstitutional laws and they are reasonable, these limitations will not prevent an aggrieved person from pursuing them if it is reasonable under the circumstances of the case, that notice of them be given or if the reason for the untimely filing is the essence of the complained of constitutional deprivations.

The Fourteenth Amendment to the federal Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." The California Constitution also contains due process guarantees (Art. I, §§7, 15).

The Due Process Clause has been interpreted as a limitation upon the legislative as well as the judicial and executive branches of the government, thus preventing arbitrary and unreasonable legislation. This aspect of the subject is known as substantive due process, to distinguish it from procedural due process. Adamson v. California, 332 U.S. 46 (1947).

The Horn v. Ventura (24 Cal.3d 605 (1979)) case involved proceedings between a contiguous land owner and the County

in which the owner objected to the approval of a new subdivision because it would in part increase both traffic congestion and air pollution. The court held at page 616

> "whenever approval of a tentative subdivision map will constitute a substantial or significant deprivation of property rights of other landowners, the affected persons are entitled to a reasonable notice and an opportunity to be heard before the approval occurs."

The Horn court went on to say at page 617

> "However, where, as here, prior notice of a potentially adverse decision is constitutionally required, that notice must, at a minimum, be reasonably calculated to afford affected persons the realistic opportunity to protect their interests" (citations omitted).

The Horn court responded to the defendant's argument based on provisions of the "S.M.A." on page 616 in part as follows:

> "It is a sufficient response to note that the due process requirements discussed herein are not rooted in the statute but are compelled by the stronger force of constitutional principle."

It should be noted at this point that it would not have imposed an insupportable additional administrative burden on "The City" to add to the "notice" they mailed out to contiguous owners, the truncated time limits for judicial review, as provided for in their own ordinance (§1.16.010(f)) (S.A. 500; 501) to persons with interest much less substantial and significant than plaintiffs-appellants.

"The City's" "notice and hearing" were inadequate to meet due process standards where plaintiffs' fundamental vested and constitutional rights are substantially and significantly affected.

The process did not provide for a meaningful notice or a fair pre-deprivation hearing nor post hearing due process.

The "notice" received and the "hearing" provided obviously led to no satisfaction of plaintiffs' due process rights.

Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use procedures which have been traditionally associated with the judicial process. The considerations of what procedures due process may require must be determined by examining the precise nature of the government function involved as well as the private interests that have been affected by the governmental action. Mathews v. Eldridge, 424 U.S. 319 (1976).

In the recent case of Traverra* v. People ex rel Dept. of Transportation, 9 Cal.App.4th 477, 1647d, modified (1992), the Court determined that a statute failing to provide for any pre or post hearing to owners of billboards is unconstitutional. A petition for review is currently pending in the California Supreme Court. [Case was reversed by the California Supreme Court on grounds that are not applicable to the case at bar.]

It is clear from the record in the case at bar: the nature of the proceedings that plaintiffs were subjected to, the substantial and significant interest plaintiffs were deprived of, and the minimal burden that remedial procedures would have caused, that the plaintiffs were denied their procedural and substantive due process and equal protection rights.

The most limited standard of judicial review must look into the matters of fundamental authority and abuse of discretion, and based on the Superior Court's ruling, it did neither. A person aggrieved has a right to a judicial determination of constitutional questions and of other questions of law. Bodinson Mfg. Co. v. California Employment Commission, 17 Cal.2d 321, 325 (1941). Where a constitutional right is involved in the factual determination, the courts must make an independent examination. Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920).

[*Case was reversed by the California Supreme Court on grounds that are not applicable to the case at bar.]

Where the facts relate to the jurisdiction or fundamental authority of the administrative agency, either under the constitution or the statute, judicial review of that determination is also required. Western Air Lines v. Sobieski, 191 Cal.App.2d 399, 406 (1961).

The Superior Court assumed that plaintiffs' W.O.M. action was to be reviewed on the basis of a quasi-legislative standard. The proceedings between the defendants-respondents is without question quasi-judicial. Where "The City" simultaneously acts in a quasi-judicial and quasi-legislative capacity, even ordinary facts must be reviewed under the substantial evidence test. Mountain Defense League v. Board of Supervisors, 65 Cal.App.3d 723, 729 (1977). Plaintiffs' identified private interests were never noticed, or even considered at the hearing involving "The Developer's" application for a new subdivision. As to plaintiffs' interest, there was never any notice or hearing! How can the defendants claim that plaintiffs had a constitutionally adequate pre-deprivation hearing? It is beyond any doubt that the decision as to plaintiffs is null and void and therefore is subject to collateral attack.

"The City's" action relating to its traffic management decision transgresses "The City's" authority, which under Vehicle Code §21 has been preempted by the state and any delegation of this power must be expressly, and not impliedly, authorized by the state Legislature. "The City's" action was without jurisdiction and is void. In such a case, the court does not review the action for abuse of discretion because there is no discretion to abuse. Association for Retarded Citizens v. Department of Developmental Services, 38 Cal.3d 384, 391 (1985). Because "The City" acted without jurisdiction, its decision is subject to collateral attack. City and County of San Francisco v. Padilla, 23 Cal.App.3d 388, 400 (1972). The Padilla case also holds that the agency may act in excess of its jurisdiction by the way it proceeds to or during the hearing resulting in a prejudicial abuse of discretion because it had not proceeded as required by law. "Conduct of the proceeding" can result in the agency acting in excess of its jurisdiction to the same effect of the agencies acts without jurisdiction in its

fundamental sense. In either case, the agency's decision would be subject to collateral attack. Any proceedings attacking a void decision can be made at any time, and will not be subject to the bar of the statute of limitations, only to laches.

APPELLANTS' REPLY BRIEF

At pages 36-43:

D. TRUNCATED LIMITATION PERIODS WITH A NONCLAIM CLAUSE REQUIRE NOTICE TO APPELLANTS TO BE CONSTITUTIONAL.

The SMA provides for notice to adjacent landowners "whenever approval of a tentative map will constitute a substantial or significant deprivation of the property rights." Government Code §66451.4. The nonclaim provision of said §66499.37 provides in substance the barring of all claims but, by its literal terms, does not bar claims for "damages or compensation." The SMA does not contain any provision which provides the same type of notice contained in C.C.P. §1094.6(f). "The City's" ordinance for the "Time Limits for Judicial Review," Section 1.16.010, provides notice to the party of the time within which judicial review must be sought. However, said section only applies to officers or employees of "The City" and applicants for permits, licenses and retirement benefits, but not for adjacent landowners, 3(J.A. 500, 501).

Appellants did not receive a predeprivation notice or hearing, notice of the decision, a notice as to the time in which to seek judicial review, nor a notice of the nonclaim provision. As known adjacent landowners, their federal and state due process and equal protection rights were denied them, as well as their rights to just compensation.

"The City" was under an affirmative duty by virtue of the federal and state constitutions, statutes and case law to provide appellants with actual and meaningful notice of their rights including a fair predeprivation hearing. People v. Swink, 150

Cal.App.3d 1076, 1079, 1101, 1102 (1984); Minor v. The Municipal Court, 219 Cal.App.3d 1541, 1549, 1550, 1551 (1990).

In 1988 the Supreme Court of the United States held in a 8 to 1 decision that a nonclaim statute violated the due process clause. Where the creditor was known to have a protected property interest and his location was known or reasonably ascertainable, they were entitled to actual notice of the fact that the statute could adversely affect a creditor's protected property interest. Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988).

A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference. James v. Oakland Traction Co., 10 Cal. 785 (1909).

The modern view as to the validity, under the Federal Constitution, of prejudgment attachment, garnishment, replevin and like procedures authorizing summary possession of property, is represented by the Fuentes v. Shevin case at 407 U.S. 67 (1972) and the Tulsa case. Courts in a number of cases have held that the state statutes authorizing the prejudgment seizure of personal property without notice to the owner, and without affording him an opportunity to be heard prior to the seizure, violated procedural due process standards under the federal Constitution. There are exceptions but none are applicable in the case at bar.

Prior to an action that will affect an interest in life, liberty, or property, a State must provide "notice" reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983).

For further application of these principles see: Probate Code §9001(a) and §9050; Adams v. Egley, 338 F.Supp. 614 (1972) (summary repossession under Commercial Code); Randone v. Appellate Department, 5 Cal.3d 536 (1971) (attachment - C.C.P. §537 held unconstitutional); Blair v. Pitchess, 5 Cal.3d 258 (1971) (claim and delivery law violated due process).

If Miranda is required to be warned, why not the adjacent landowners? Miranda v. Arizona, 384 U.S. 436 (1966).

Even a strong public policy in favor of the building industry and land planners still requires them to accomplish their laudable goals commensurate with the constitutional rights of the adjacent owners.

Respondents' confidence in the recent case of Patrick Media Group, Inc. v. California Coastal Commission, 9 Cal.4th 592 (1992), is misplaced. The Patrick Media Group (PMG) was in privity with applicant and the lessee-assignor and also made a demand for compensation and was notified of the denial. PMG was thus a party and had notice of the predeprivation proceedings. Further, the Public Resources Code and §§13106, 30801 of the California Coastal Commission Regulations, provide for a post-hearing procedure.

The case is decided on the bases of res judicata and the balance of the opinion contains dictum. It also should be noted that the PMG court would in all fairness permit PMG to file within the period allowed for judicial review, starting not with the decision, but from the time they received actual notice. Also the court expressly states that United States v. Dickinson, 331 U.S. 745 (1947) and Pierpont Inn v. State of California, 70 Cal.2d 282 (1969) would be followed if, as in the case at bar, the tolling, or suspension, of the statute and the estoppel of a defendant to raise the statute was a defense. On page 615 the PMG court indicated "where the plaintiff, without fault, is unaware of a cause of action or of its extent, or where fraud or other misconduct by the defendant has caused the plaintiffs' inaction, they would permit the 'late filing.'"

Presenting Jamul v. Board of Supervisors, 231 Cal.App.3d 665 (1991) and California Coastal Commission v. Superior Court (Ham), 210 Cal.App.3d 1488 (1989), are also sound decisions but are not authority for the respondents' arguments because they are also distinguishable from the case at bar for the same reasons that the Rossco and PMG cases are distinguishable.

The non-claim provisions of the SMA and "The City's" subdivision ordinance are unconstitutional for their failure to

provide for actual notice for a predeprivation adjudicatory proceeding.

There is no contest in balancing the policy considerations in support of the statute of limitations, against the policy considerations of an individual's rights guaranteed by the Constitutions. Constitutional rights prevail.

E. STATUTE OF LIMITATIONS DEFENSE IS NOT A BAR TO NULL AND VOID PROCEEDINGS, DECISIONS AND LAWS.

That based on the facts alleged in the complaint, appellants have provided the citations to authority that support their contentions that proceedings, decisions and laws that are void may be collaterally attacked (A.O.B. 42-47). The respondents in their responses and on the admitted facts cite only one case to refute appellants' authority and that case is not applicable to the facts, and by implication is support for appellants' position.

In the case at bar, the complaint alleges that "The City" was without fundamental jurisdiction of both the person and the subject matter; that the proceedings and the decision were void; and that the statute and ordinance in question were unconstitutional and void. These allegations are supported by facts.

In Hawkins v. County of Marin, 54 Cal.App.3d 586, 593 (1976), the court cites authority with approval, that involved judgments that were void due to jurisdictional defects apparent on the face of the record. The court then went on to say that: "The doctrine of these cases should not be extended to those involving the review of conditional use permits allegedly not issued in conformity with statutory requirements." Again, the court was right, but those are not the facts alleged in the complaints, and on the face of the record. The record shows that the tribunal was without jurisdiction in the fundamental since, and just that they made an error.

The respondents cite two other cases as support for their argument in unrelated sections of their brief. They do relate to the issue of the inapplicability of the statute of limitations as a bar to a void proceeding and thus will be dealt with. They cite

the case of Allis-Chalmers v. City of Oxnard, 105 Cal.App.3d 876 (1980) for the proposition that a "short statute of limitations even against the civil rights claim" is a bar (R.B. 31-32). Allis-Chalmers received notice of the assessment proceedings, attended and made objections. The taxing tribunal had jurisdiction, and Allis-Chalmers had notice and a hearing. Because the facts alleged in the complaint at bar are totally distinguishable on all significant facts, the case does not support respondent's argument.

The Respondents in another section of their brief cite the case of City of Baldwin Park v. Stouskus, 8 Cal.3d 563 (1972), for the proposition that: "may not untimely attack special assessment in later proceedings" (R.B. 14). They fail to point out that the claimant in that case had notice of the proceedings, attended the hearing, and made an objection on the ground of disproportionality between the tax benefit and the tax burden. The court correctly held that the claimant under those circumstances could not collaterally attack the assessment, even under the new ground based on the Constitution.

In Justice Brennen's opinion he captures the essence of "due process" in land regulation cases as follows:

> "After all, if a policeman must know the constitution, then why not a planner.?" (Page 621, FN 26.)

The record in the case at bar shows that the proceedings, decision and laws were null and void, thereby depriving the tribunal of fundamental jurisdiction. Accordingly, the statute of limitations cannot be a defense in this case.

APPELLANTS' PETITION FOR REHEARING

At pages 31-33:

VI.
ASSUMING, *ARGUENDO*, THAT THE PROCEEDINGS, DECISIONS AND LAWS ARE SUBJECT TO THE STATUTE OF LIMITATIONS DEFENSE, THE APPELLANTS HAVE RAISED NUMEROUS REASONS, ANY ONE OF WHICH WILL BAR ITS USE

The Appellants' Opening and Reply Briefs set forth in detail the substantive and procedural bars of suspension, estoppel and tolling. It also demonstrates the limitations of the statute of limitations defense being raised by demurrer rather than by an answer. These will not be repeated, except to call the Court's attention to our Supreme Court's premier case of Pierpont Inn v. State of California (1969) 70 Cal.2d 282 (Pierpont). Because of the continuing and accelerating nature of the damages and the City having full knowledge of Appellants' asserted rights even prior to their decision and thereby not be prejudiced, makes that case a perfect one to apply the doctrine of "judicial suspension" (claims based on nuisance-type damages also frequently employ this concept). Curiously, the Court failed to address these issues, probably because of a misunderstanding of the facts. The Court's failure to address these issues as well as the other bars covered in their briefs has resulted from a misunderstanding of the facts as alleged in the Complaint and does an injustice to Appellants.

The City approved and adopted a traffic regulation for public safety in relation with its approval of Fieldstone's subdivision.[5] Under the Vehicle Code and the Subdivision Map

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5 The mere fact that the City approved and adopted a traffic regulation, (not within the subdivision) on its public roads and for the laudable purpose of public safety, contemporaneously with its subdivision land regulation and zoning proceedings does not nor can it be claimed as an immunity under the S.M.A. In certain cases the Courts can require compliance with the act as

Act, this required a minimum of at least two more notices and hearings. No such notice was given and no such hearing was had. The City traffic regulation, was adopted by stealth, it is "D.O.A.!"

That being the case, it would be unnecessary to develop the basis for the necessity for at least two more notices required by the Constitution (also they were addressed in Appellants "Fatal Constitutional Flaws" infra). Accordingly, Appellants will merely identify them for the Court's convenience.

The facts alleged require a predisposition proceeding; notice and hearing that are mandatory. For an explanation of the constitutional basis of this requirement and the criteria that must be adhered to, see the Horn case, supra.

The United States Supreme Court in 1988 held in an 8 to 1 decision that the employment of a truncated statute of limitations, (e.g. Government Code §66499.37) requires actual notice to be constitutional. Tulsa v. Pope, supra.

It should also be noted that the City, in its own ordinance (§1.16.010(f)), provides for notice of the entry of the decision and the time limits for judicial review for a class of persons with interests much less substantial then Appellants. Also, the Code of Civil Procedure §1094.6, in like situation, required the same type of notice (Appellants' Opening Brief at 38-42; Appellants' Reply Brief at 36-40).

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procedural condition to raising the constitutional issue such as the Rossco Holding, Inc. v. State of California (1989) 212 Cal.App.3d 642 (Rossco). (Appellants' Reply Brief 30-31, 40). These cases are all distinguishable on the material facts, which stated briefly are: (1) Appellants are not applicants or parties; (2) no notice of a pre-deprivation hearing; (3) no waiver; (4) excused from exhausting administrative remedies; (5) excused from filing for judicial review; (6) the taking was not a regulatory "taking" but a "physical taking"; (7) Appellants filed for judicial review in a timely fashion from an adjudication proceeding; (8) the proceedings were constitutionally flawed and thus null and void; (9) Appellants raised good and valid defenses as a bar to the statute of limitations defense; (10) the record and the applicable law make it just unfair to bar Appellants' meritorious constitutional claims.

The fact that the City is required to provide all these notices does not impose upon them an insupportable administrative burden or cost. They merely add to the notice of public hearing, whatever additional notices, that are required by the law (and also in all fairness). This is "duck soup" with today's word processors. The Subdivision Map Act even provides for the developer to pick up the cost, if any.

It is manifest from the record herein that this Court owing to a mistake of law and a misunderstanding of the facts, affirmed the trial Court's sustaining of the demurrer to the three Causes of Action in Count III of the Complaint. The injustice done to Appellants is profound. This is particularly painful because it is seriously doubted that the original decision is correct.

PETITION FOR REVIEW OF DECISION
BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT [DIVISION ONE]
FILED JUNE 17, 1994

At page 23:

F. ASSUMING, *ARGUENDO*, THAT THE PROCEEDING, DECISIONS AND LAWS ARE SUBJECT TO THE STATUTE OF LIMITATIONS DEFENSE, THE APPELLANTS HAVE RAISED NUMEROUS REASONS, ANY ONE OF WHICH WILL BAR ITS USE.

1. Without waiving the other "bars" to the statute of limitations defense, the Appellants call the Court's attention to Pierpont, infra. The material facts and issues are the same as in the case at bar, and the doctrine of "judicial suspension" being based on good logic and reason, the case is dispositive of the putative defense of the statute of limitations[11].

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11 Footnote omitted in printing.

2. The Nestle case, infra, had earlier held "that every repetition of the wrong may create further liability," thereby indicating that in continuing injury cases that statute of limitations may never be a defense so long as they are continuing.

III. DENIAL OF THE CIVIL RIGHTS CAUSE OF ACTION §1983 INCLUDING INVERSE CONDEMNATION AND THE CAUSE OF ACTION FOR A WRIT OF MANDATE BASED THEREON

APPELLANTS' OPENING BRIEF

At pages 33-34:

1. THE TRIAL COURT ERRONEOUSLY SUSTAINED DEFENDANTS' DEMURRER BY FAILING TO APPLY FEDERAL LAW TO DETERMINE WHETHER THE COMPLAINT ALLEGES A GOOD CAUSE OF ACTION UNDER THE FEDERAL CIVIL RIGHTS ACT.

In the case of Gomez v. Toledo, 446 U.S. 635 (1980) the court stated on page 577,

> "By the plain terms of §1983, two -- and only two -- allegations are required in order to state a cause of action under the statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. See Monroe v. Pape, 365 U.S. 167 . . ."

Plaintiffs-Appellants have made both of the required allegations (J.A. 416: 7-17). Further, there is no basis to impose on the plaintiffs an obligation to anticipate "matters constituting an avoidance or affirmative defense." The Gomez court in its unanimous opinion also stated at page 576,

"Section 1983 provides a cause of action for 'the deprivation of any rights, privileges, or immunities secured by the Constitution and laws' by any person acting 'under color of any statute, ordinance, regulation, custom, or usage of any State or Territory.' This statute, enacted to aid in 'the preservation of human liberty and human rights' . . . reflects a congressional judgment that a 'damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees.' As remedial legislation, §1983 is to be construed generously to further its primary purpose." (Citations omitted.)

In the case of Bach v. County of Butte, 147 Cal.App.3d 554 (1983), the court held that the state courts of California should apply federal law to determine whether a complaint pleads a cause of action under the federal Civil Rights Act sufficient to survive a general demurrer. The headnotes 1 to 8 both inclusive contain a succinct summary of the applicable law the California courts should use in passing on a general demurrer to a cause of action under the federal Civil Rights Act.

In light of the clear statement of law and the facts alleged in the pleading in question (J.A. 393-437), plaintiffs-appellants have pleaded a cause of action.

APPELLANTS' REPLY BRIEF

At pages 24-29:

C. THE APPELLANTS HAVE BEEN DENIED THEIR FEDERAL AND STATE RIGHTS AND THE TRIAL COURT ERRONEOUSLY SUSTAINED THE DEFENDANTS' DEMURRER. THE TRIAL COURT ALSO ERRED BY FAILING TO APPLY THE CORRECT STANDARD OF JUDICIAL REVIEW TO EXAMINE THE MANDAMUS ACTION AND ABUSED ITS DISCRETION BY NOT ALLOWING LEAVE TO AMEND.

The public hearing conducted by "The City" was three hearings in one. The first related to the action taken by "The City" to control traffic. These acts were beyond their authority and jurisdiction.

The Subdivision Map Act, Government Code §§66410-66499.37, SMA does indeed provide for the regulation, control of the design and improvement of subdivisions with consideration for their relation to the adjoining areas. It is obvious that these and other physical requirements in the plan of the subdivision are intended for intramural application only (§66411). Additionally, the SMA cannot be used to emasculate the Vehicle Code §21 which has preempted the field of traffic control unless "expressly provided" by the Legislature. The Vehicle Code does provide for legal means to engage in limited traffic control under certain conditions. However "The City" neglected or elected not to do so and it was not done in accordance with requirements of the law. Further, traffic control requires a general plan amendment to implement it and Government Code §§65351, 65357, requires "The City" to provide notice and an opportunity for the public to become involved in amendments to the general plan. No such notice was given to appellants. "The City's" decision relating to traffic control is void. City of Poway v. City of San Diego, et al., 229 Cal.App.3d 847 (1991).

The second hearing was appellants' "pre-deprivation hearing," and this also being without jurisdiction, notice, or a hearing is void. Horn v. County of Ventura, 24 Cal.3d 605 (1979); Tulsa v. Pope, etc., 485 U.S. 478 (1988).

The third hearing was the public hearing on "The Developer's" application for approval of the tentative map. Plaintiffs-appellants were strangers to those proceedings and appeared as "witnesses" for the tribunal, to better enable them to make an informed decision. This hearing was the culmination of years of negotiations between "The Developer's" staff and "The City's" staff. The staffs, in lock-step then gave a choreographed presentation. It was an impressive show, 2(J.A. 399: 1-22). The public had been duly notified of this hearing and appellants attended as part of a "S.R.O." audience. Both the respondents by their staff made a lengthy and extravagant presentation, 2(J.A. 399: 1-9).

The public then was permitted to provide the hearing officers their opinions as to the new subdivision. These presentations were limited and tightly controlled, 2(J.A. 399: 10-28; 400: 1-18). Thereafter the respondents were given unlimited time to answer the public objections, 2(J.A. 400: 19-22). At no time were the appellants given an opportunity to cross-examine the witnesses of the respondents, nor any time to even argue in reply, 2(J.A. 400: 22-25). No notice of the decision or of anything else was ever given to appellants, 2(J.A. 403: 9-25; 404: 8-19).

The hearing, as a "Town Hall" public hearing, has not been objected to by appellants except as effected by the perverted use of: (a) the adoption of a traffic management plan; and (b) used in lieu of a pre-deprivation proceeding, together with the effect of the nonclaim statute of limitations. As to these matters the hearings "were a sham and a fraud on the plaintiffs," 2(J.A. 405: 3-26). The allegations in the complaint present a classic case of arbitrary adjudicative proceeding violative of both the federal and state constitutions.

"From a pleading standpoint, plaintiffs have thus adequately described a deprivation sufficiently to require procedural due process protection." Horn v. City of Ventura, 24 Cal.3d 605, 615 (1979).

Where prior notice of a potentially adverse decision is constitutionally required, that notice must at a minimum be reasonably calculated to afford affected persons the realistic opportunity to protect their interests.

Justice Brennan's opinion expresses this thought in the following quotations:

> "The States should be free to experiment in the implementation of this rule (procedures or form of remedy) provided that their chosen procedures and remedies comport with fundamental constitutional command." (Parenthesis added and citations omitted.) (Page 660.)

> "But the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive or judicial branches." (Page 661.)

> "That guarantee was not designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be born by the public as a whole." (Page 656.)

1. <u>The complaint alleges a good cause of action under the Federal Civil Rights Act</u>.

Respondents do not take issue with the points and authorities in appellants' opening brief (pp. 33-34) in support of their position that under federal law, appellants state a good cause of action. However, they now argue that appellants do not have a protected vested interest, and even if they did, it is barred by the statute of limitations.

The appellants have a cognizable, protected, vested interest. The respondents cite Love v. Navarro, 262 F.Supp. 520 (C.D.

Cal. 1967), as being "remarkably similar." Nothing could be further from the truth. The Love case holding is a pure and simple matter of the complaint in that case not alleging any infringement of the federal Constitution.

Appellants' case does not rest on a "vested right in zoning" but on the fact that they have a vested right in possession and use of their property, infra pp. 13-18. There is no need to claim a vested right in zoning when land regulation decisions cause physical interference or invasion of your protected vested property rights. The airport, highway, noxious odors and other actual and constructive physical "taking" cases are examples of not needing a vested right in zoning to recover compensation if there is a "taking."

The reason why the statute of limitations is not a bar to appellants' civil rights action are the same as has been set forth in particularity in their opening brief, pages 15-26, and infra 1-4, and supra 34-43, and does not merit further discussion or authority.

Thus, neither of respondents' arguments have any legal or factual support. The appellants have alleged a good cause of action that is not barred under the federal Civil Rights Act.

. . .

At pages 35-36:

3. <u>The complaint alleges a good cause of action in mandamus</u>.

The appellants' mandamus action is an alternative remedy to the causes of action I and II. It also served as a procedural device to challenge the constitutionality of the
proceeding and decision of "The City," 2(J.A. 410: 7-15). The mandamus action, per se, is based on the allegations of the complaint which if true would establish that the final map proceedings were an adjudicative, discretionary function and "The City" was not required to approve the tentative map, 2(J.A. 410: 17-28; 411: 1-2; 411: 13-19; 416: 18-24). Appellants filed their complaint within forty-five days from the approval of

the final map, 2(J.A. 408: 25-28). Appellants allege that the final map was not mandatory, 2(J.A. 401: 26-28; 402: 1-28; 403: 1-8). "The Developer" did not have a "vested right", 2(J.A. 407: 11-28). The SMA provides that a final map shall be disapproved for the failure of meeting the requirements of the statute or ordinance, the only qualification being that the requirements or conditions existed at the time of the approval of the tentative map, 2(J.A. 408: 1-9). The SMA further provides that the map shall also be denied if it is ". . . likely to cause substantial environmental damage", 2(J.A. 408: 10-14). The complaint alleges that it will cause substantial environmental damages, 2(J.A. 408: 15-20). Appellants allege that the mandamus action is necessary to protect their rights, 2(J.A. 406: 9-15) and also that an actual controversy exists, 2(J.A. 419: 4-7).

The respondents' objections are based on appellants' Second Amended Complaint. The respondents' demurrer to said complaint was sustained, but the appellants were given leave to file their Third Amended Complaint, 3(J.A. 631).

All three causes of action stated in the Third Amended Complaint state good causes of action and none are barred by the statute of limitations.

ATTACHMENT TO THE SUPPLEMENTAL PETITION FOR REHEARING:

TOPICAL TABLE, WITH INDEX TO CITATIONS IN THE JOINT APPENDIX THAT SUPPORT APPELLANTS' CAUSES OF ACTION

I.
INVERSE CONDEMNATION VS. CITY

II.
NEGLIGENCE vs. FIELDSTONE

A. Site Preparation

B. Complicity With City

III.
WRIT OF MANDATE VS. CITY

A. Federal Civil Rights Violated

B. California, Constitutional Based, Abuse Of Administrative Proceedings

C. Review Of Administrative Tribunals (City Council) Action, Re: Land Regulation And Zoning In Connection With Proceeding For Proposed Subdivision

I.
INVERSE CONDEMNATION vs. CITY

To state a cause of action for inverse condemnation, the complaint must allege facts to show: (a) taking; (b) for public use or purpose; (c) private property; (d) without just compensation. The Harding case[1] is substantially the same in all material respects. It is controlling. Appellants' Complaint complies with its requirements.

Subject	Citation
Appellants' home is private property	2(J.A. 250:24-28); 251:1-2)
The City is a public entity.	2(J.A. 2:22-24)
Fieldstone's original plan and its application requested the access to its subdivision be located on Alicante Road	2(J.A.:13-15)
The access was changed by the City to Corté de la Vista "for traffic safety purposes."	2(J.A. 252:13-26)
The relocation of "the gate" was the means the City used to regulate traffic.	2(J.A. 253:4-28; 254:1-8)
The relocation of "the gate" was based on consideration of public safety for the public at large, "and not for any private purpose or use."	2(J.A. 253:4-8)

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1 Cases that have been cited in the Petition For Rehearing will be cited herein as if this Petition is merely a supplement to it with newly developed and discovered material.

"The City's" requirement that "The Developer" relocate the access to the project for ingress and egress ("the gate") (N.B. "the gate" is shorthand for the relocation of the access for public safety.	2(J.A. 253:9-10)
"The gate" was for the express purpose of regulating traffic, and as such, serves a public purpose and use."	2(J.A. 253:10-13)
Traffic regulations was the public "improvement."	2(J.A. 253:13-14)
The act of relocating "the gate" directly and wrongfully diverted the heavy traffic from Alicante Road and re-routed it to Corté de la Vista thereby increasing, unreasonably and excessively, the volume of traffic, and destroying the residential environment of the plaintiffs' home. "The gate" will be constructed in its new location by "The Developer" as authorized and directed by "The City" and subject to its approval, and said gate will be accepted by "The City" by "The City's" integrating "the gate" into its public roadways.	2(J.A. 253:14-22)
That both Alicante Road and Corté de la Vista are public improvements and part of the public roads owned and maintained by "The City." The relocation of "the gate" by "The City's" affirmative action was not only by its substantial participation, but the sole and direct cause of creating and causing the condition that will result in the damaging and/or taking plaintiffs' property by the trespass, nuisance and air pollution more fully described elsewhere in plaintiffs' complaint.	2(J.A. 253:23-28; 254:1-2)

As a direct result thereof, the flow of traffic will all enter and exit on Corté de la Vista which is a public street and not a private driveway, and integrated into the public streets on the admitted grounds for the public safety of the community as a whole and will dramatically and adversely increase the volume of traffic and change the residential environment.	2(J.A. 254:3-8)
That "The City's" taking is official governmental action ..."	2(J.A. 254:27-28)
As a direct and necessary result of the aforesaid governmental action, the noise, dirt, odor, air pollution, flashing headlights and vibrations cause, and will continue to cause, a substantial interference with the use and enjoyment by plaintiffs of plaintiffs' homes, the loss of reasonable investment-backed expectations, and a diminution in its primary use and value.	2(J.A. 255:4-10)
Plaintiffs have received no compensation for their damages, nor has "The City" instituted eminent domain proceedings.	2(J.A. 259:3-5)
Deprivation of Appellants' constitutional rights.	2(J.A. 259:6-12)
"The City," by its decision and failure to justly compensate the plaintiffs, has deprived the plaintiffs of their constitu-tional right to a jury to determine their damages.	2(J.A. 259:13-16)

II.
NEGLIGENCE vs. FIELDSTONE

Both causes of action against Fieldstone are based on negligence, causing pollution and nuisance-type damages. The essential elements that must be alleged in the Complaint are: duty; breach of duty; a causal connection between the acts and/or omissions and the damages; and damages. Appellants' Complaint satisfies these requirements nor has any issue been raised as to their adequacy.

The Respondents and the Court's sole defense relies on the Civil Code section 3482. Said section provides, "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

The statute cannot be read without viewing it with the "judicial gloss" that has been added. Courts have severely limited the application of the statutory immunity by holding that it cannot be pleaded in justification of acts which would otherwise constitute a nuisance unless the act is authorized by the express terms of the statute relied on, or, "by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very acts which occasions the injury." Hassell v. San Francisco (1938) 11 Cal.2d 168, 171.

To say that the Subdivision Map Act, by its "express terms" authorized the City to unlawfully engage in traffic management without jurisdiction and provide Fieldstone (not in privity with the City) with a statutory immunity is contrary to the letter and spirit of the Hassell case.

A fair reading of the statute does not permit this result nor does Fieldstone have any standing to invoke this immunity. Based upon the allegations in the Complaint, this defense cannot be raised by demurrer. The manner in which the acts and omissions occurred and the nature and extent of the injuries to Appellants are not only unreasonable and as a result negligence, but they were willful. Lacher v. Superior Court of Orange County (1991) 230 Cal.App.3d 1038.

Subject	Citation
May 10, 1990, notice given to Fieldstone of objections to "relocation of gate."	2(J.A. 262:5-12)
Fieldstone did not object to the "relocation" or pursue remedy.	2(J.A. 262:13-23)
Fieldstone's negligent manner.	2(J.A. 262:24-27)
Site construction to take a year and thereafter several years to complete the project.	2(J.A. 264:14-20)
Site construction damage to end; the damage due to the increased volume of traffic will be continuing and permanent.	2(J.A. 264:26-28; 265:1-2)
The volume of traffic will increase over 1,300 "trips" a day, funneled to a point across the street from Appellants will directly cause Appellant unreasonable damages.	2(J.A. 265:13-28)
The view and ocean breeze is still there but cannot be enjoyed.	2(J.A. 266:4-13)
The nuisance is based on fault is unreasonable.	2(J.A. 267:9-12)
Fieldstone's acts and omissions causing the pollution and nuisance damages described with evidentiary detail in the Complaint was willful, oppressive and malicious.	2(J.A. 267:26-28; 268:1-3)
Section 3482 of the Civil Code does not provide a statutory immunity to Fieldstone for their unreasonable acts and damages to Appellants.	2(J.A. 269:15-24)

III.
WRIT OF MANDATE vs. CITY

A. Federal Civil Rights Violated

In the case of Gomez v. Toledo (1980) 466 U.S. 635, the court stated on page 577:

> By the plain terms of §1983, two -- and only two -- allegations are required in order to state a cause of action under the statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. See Monroe v. Paper, 365 U.S. 167.

Subject	Citation
"Plaintiffs are citizens of the United States..."	2(J.A. 395:6)
"The City is a public entity..." and as such, is a person under the civil rights law.	2(J.A. 396:4,5)
The City acted under color of state law.	2(J.A. 397:10-17)
The Public Hearing was a sham.	2(J.A. 399:10-22)
One-sided hearing.	2(J.A. 400:19-25)
The notice to the multi-faceted hearing was defective; neither the hearing or the notice conform to the standards of the "due process" clause of the Federal or State constitutions.	2(J.A. 404:20-24)
Appellants were deprived of their Federal "due process" and "equal protect" rights under the Federal Constitution.	2(J.A. 404:25-28; 405:1-26)

Appellants did not receive reasonable notice or opportunity to be heard prior to the deprivation of its property rights and in violation of its civil rights.	2(J.A. 408:21-24)
Appellants' property and civil rights were denied them in violation of the City's duty.	2(J.A. 411:3-12)
The violations of Appellants' rights were caused by the City's acts and omissions under color of law and in violation of their constitutional rights.	2(J.A. 412-414:1-18) and 1(J.A. 415:4-21)
The City acted under color of state law and violated Appellants' rights as aforesaid causing Appellants damages and said acts are not isolated.	2(J.A. 416:7-28; 417, 418:6-26)
Appellants' right to possession and use of their property is based upon the positive law of California (see A.R.B. 13-17) and provides the substantive bases for its claim under the civil rights remedies law.	2(J.A. 411:10-12; 412-415:1-21)
Requirements for approval of the final map, makes it clear that the proceedings are adjudicative in nature.	2(J.A. 408-409:1-20)
Appellants were not parties to the proceedings between the Respondents.	2(J.A. 409:26-28)
The decision to divert traffic was in excess of the City's jurisdiction, counter-productive and inconsistent with the general, special and circulation plan.	2(J.A. 410:17-28, 411)

The City's diversion and funneling the traffic of the 132 project denied Appellants of their civil and property rights.	2(J.A. 415-418:1-18)
The City notice and agenda are prima facie evidence that the notice and hearing did not meet constitutional "due process" and "equal protection" standards.	2(J.A. 426-427)

B. California, Constitutional Based, Abuse Of Administrative Proceedings.

California Civil Rights, also includes the right to be free from arbitrary adjudicative procedure (Appellants' Reply Brief 29-35).

The law is set forth in Appellants' Reply Brief, pages 29-35. The facts to establish this cause of action will be found in the Complaint. More particularly, without limiting the generalities of the foregoing, see immediately hereafter, part III. C., the references to the facts in the Joint Appendix. It will show that Appellants have alleged that: "Respondents have proceeded without or in excess of jurisdiction"; have denied Appellants a "fair trial"; and has been guilty of "prejudicial abuse of discretion."

C. Writ of Mandate for Review of Adjudicative Administrative Proceeding and for an Order to Set Aside the Decision.

Subject	Citation
Tentative map approval was conditional and subject to the requirements of the final map, both of which items required "discretion."	2(J.A. 400:26-28, 401:1-7)

The City ordinance made it mandatory for them to provide a notice and hearing where you "shall be heard" and "discretion" shall be used.	2(J.A. 397:23-27); 2(J.A. 398:1-13)
DESCRIPTION OF THE HEARING	2(J.A. 399-407:1-10)

THIS CONCLUDES APPELLANTS' ABSTRACT OF THE KEY PROVISIONS SUPPORTING THEIR CAUSES OF ACTION.

APPELLANTS' PETITION FOR REHEARING

At pages 18-23:

III.

THE COURT OWING TO A MISTAKE OF LAW AND A MISUNDERSTANDING OF THE FACTS, ERRED IN REVIEWING THE TRIAL COURT'S ORDER SUSTAINING THE DEMURRER TO APPELLANTS' COMPLAINT FOR A WRIT OF MANDATE CAUSE OF ACTION RESULTING IN AN INJUSTICE TO THE APPELLANTS

C. The Federal and State civil rights' Causes of Action, having been addressed in Appellants' Opening Brief at 33-34, 34-37, and Appellants' Reply Brief at 27-33, as parts A and B, III of this Petition, Appellants will not repeat them.

The Court failed to address Appellants' civil rights Causes of Action, based on California law, except inferentially based on its reasons for concluding that Appellants' Causes of Action based on federal law were defective. Assuming, *arguendo*, that this is the case, it would still be prejudicial error because the federal Civil Rights law is not coexistential with California's law

in this regard. People v. Ramirez (1979) 25 Cal.3d 260; City and County of San Francisco v. Padilla (1972) 23 Cal.App.3d 388, 400.

It should be plain because it is explicit, that Appellants are not claiming the denial of zoning rights but "fundamental" vested, compensable property, and civil, and constitutional rights. This is also another example of Respondents' "facts" being in lieu of the facts in the Complaint. The Court's opinion on the bottom of page 16 and the top of page 17, demonstrate the results of using the wrong and impermissible "facts."

Respectfully, Appellants bring to the Court's attention their objection to the Court's opinion relating to the Third Cause of Action, a Writ of Mandate, which is the Third Cause of Action, included in Count III of the Complaint.

To the extent that the Court relies on the statute of limitations defense to support its opinion, "that the statute of limitations is applicable to Appellants' claims and that they have no basis to bar its operation," Appellants incorporate by reference their defenses in bar to the statute of limitations herein set forth.

Judicial review of the administrative decisions of the City is provided for in §§1094.5 and 1094.6 of California Code of Civil Procedure. It provides for, in substance, the Court to make inquiries whether the Respondents have proceeded: (a) without, or in excess of its jurisdiction; (b) whether there was a fair trial; and (c) whether Appellants received a fair trial. It goes on to say, "Abuse of discretion is established if the Respondent has not proceeded in the manner required by law...."

Because the case involves statutory construction of both jurisdictional and constitutional facts and further because Appellants are a "suspect class" and review involves not evidence but a demurrer, which assumes the facts to be true, the review should be *de novo* and the exercise of independent judgment on the "admitted" facts. Based on this criteria and standard of review, the undisputed facts will show that the City must be ordered to set aside its decision. Poway v. City of San Diego (1991) 229 Cal.App.3d 847; Selinger v. Redlands (1989) 216 Cal.App.3d 259.

The traffic regulation adopted by the City for public safety is null and void because it acted without jurisdiction and it is in conflict with the general plan, specific plan and its "circulation element." This Court held in Carstens v. City of Del Mar (1992) 8 Cal.App.4th 1642, 1653, in substance, that the state has preempted the field of vehicular traffic regulation and as such has no authority over vehicular traffic control unless provided for exceptions in Vehicle Code §§21100-21116. There is nothing in the record to support that the City acted pursuant to such delegated power, (and if they did, it could not be raised by a general demurrer). Further, the Complaint supports the conclusion that they invoked no exception and acted without any justification. The Subdivision Map Act cannot be construed as an amendment to the Vehicle Code, which by its terms must be strictly construed. Lacher v. Superior Court of Orange County (1991) 230 Cal.App.3d 1038, Lesher v. City of Walnut Creek (1990) 52 Cal.3d 531.

The Court is requested to take judicial notice of the City's Municipal Code and its ordinances. The City has not made any amendments to its General Plan and its specific Circulation Element relating to traffic since 1985. The Circulation Element classifies Alicante Road as a secondary arterial street, designed for a volume of traffic between 5,000 and 20,000 average daily trips. Corté de la Vista is classified as a local street ending with a cul-de-sac designed to handle no more than 500 average daily trips. This record shows that Fieldstone's subdivision will triple that number by the City's "traffic" easements as alleged in the Complaint 2 (J.A. 265) and is on its face, inconsistent with the General Plan and its specific Circulation Element. Even if the City had jurisdiction to engage in traffic regulation and complied with the appropriate procedures, it would have to be disapproved for failure to meet the requirements in Government Code §§66473, 66473.5 and 66474. Specifically, it is inconsistent with the City's General Plan and the related Circulation Element, and so is the design and improvements of the subdivision. Further, as alleged in the Complaint, the traffic will cause substantial environmental damages and cause health and safety problems. This being the case, the City, by virtue of

the above sections, as well as §20.16.020 of the City Code, must disapprove the traffic regulation. It is mandatory. It is also a clear case of abuse of discretion. The Complaint alleges facts to show that the City acted:

(a) without or in excess of its jurisdiction;
(b) did not provide the Appellants with a fair trial; and
(c) abused its discretion by not proceeding in the manner prescribed by law.

Government Code §§65860(a)(ii) also provides that all ordinances must be consistent with its General Plan and the Specific Plan. Also §65353 of the same code requires a notice (§65091) and a hearing to amend the General Plan and a "§65091(a)(3) notice" if it affects the permitted use of the real estate. The City's action was not authorized under the Government Code or the Vehicle Code and is void. The Vehicle Code also has mandatory requirement for notice and hearing. The Writ of Mandate is the appropriate remedy. Section 65860 of the Government Code does not permit a Court to rescue a zoning ordinance that is invalid *ab initio*. The Court should enter an order to issue a writ of mandate to compel invalidation. (The following additional citations are not necessary for the Court's consideration but are included for the Court's convenience.) Rumford v. City of Berkeley 91982) 31 Cal.3d 545; Poway v. City of San Diego (1991) 229 Cal.App.3d 847; Uhler v. City of Encinitas (1991) 227 Cal. App.3d 795; and the following Attorney General's opinions relating to the issues: 68-101 (1985), 68-108 (1985), 75-80 (1992), 56-274 (1973).

The Court having read Appellants' briefs, knows that it corroborates what has been said in this section of the petition (Appellants' Opening Brief at 34-38) and (Appellants' Reply Brief at 24-36). It also supports Appellants' allegations that the City, without jurisdiction in the fundamental sense as well as in excess of their jurisdiction because of the fatal flaws in the necessary proceedings, which was an abuse of discretion and not a fair trial. It was not a trial at all, it was a sham and a shame!

PETITION FOR REVIEW OF DECISION BY THE COURT OF APPEAL FOURTH APPELLATE DISTRICT [DIVISION ONE] FILED JUNE 17, 1994

At pages 17-18:

C. THE COMPLAINT STATES THREE GOOD CAUSES OF ACTION IN ITS COUNT III AGAINST THE CITY, BOTTOM ON THEIR ABUSIVE "TAKING" AND DEPRIVATION OF APPELLANTS' EQUAL PROTECTION AND DUE PROCESS RIGHTS.

1. Federal civil rights action alleges that the City deprived the Appellants of a federal right under the color of law.

2. The California civil rights action:

a. Alleges that Appellants were subjected to "deprivatory governmental action" which deny them their "due process" liberty interest both in a fair and unprejudicial decision-making and with being treated with respect and dignity; "The right to be free from arbitrary adjudicative procedures"**;

b. The California law does not even require the showing of a property or liberty right in its initial due process analysis;

3. The Complaint for a writ of mandate seeks review of the administrative proceeding based on the deprivation of their constitutional rights:

a. The City acted without jurisdiction, unfairly and abusively:

(1) Abusive taking of an interest in their property without compensation;

(2) Denial of procedural due process;

(3) Denial of substantive due process;

** Footnote omitted in printing.

(4) Denial of equal protection of the law; and

(5) Denial of their civil rights guaranteed under both federal and state constitutions as fully set for in the Complaints.

b. The courts failed to use and apply the correct standard of review as to adjudicative, administrative tribunals[6].

c. The courts also failed to use and apply the correct standard of review to determine if the demurrers were sustained erroneously or, if in sustaining the demurrer without leave to amend, was an abuse of discretion[7].

Authorities in support for this heading and its subheadings are grouped together here for the Court's convenience[8].

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6 Footnote omitted in printing.

7 Footnote omitted in printing.

8 Footnote omitted in printing.

REPLY TO ANSWER TO PETITION FOR REVIEW

At pages 4-12:

II.

THE LOWER COURTS IN THIS CASE OWING TO A MISTAKE OF LAW AND MISREADING OF THE FACTS COMMITTED PREJUDICIAL ERROR IN THE SELECTION OR APPLICATION OF THE STANDARD OF JUDICIAL REVIEW OF ADJUDICATIVE ADMINISTRATIVE PROCEEDINGS

A. Section 1094.5(b) is the Applicable Standard for Judicial Review of Adjudicative Administrative Proceedings.

The city expanded the traditional items covered in this SMA proceeding. When their conduct threatened the appropriation of a traffic servitude on adjoining property, the law imposed upon them to employ due process requirements which they failed to do. While also engaged in traffic control, they thereby again, imposed upon themselves the duties and limitations of the applicable law in connection with traffic regulations and that they be consistent with their general plan, etc.

Judicial review under Code of Civil Procedure section 1094.5(b) is the applicable standard for the courts review the adjudicative administrative proceeding conducted by the City herein, in connection with Fieldstone's application for the approval of their proposed subdivision plan. Neither the remedy nor Appellants standing have been questioned, nor well can they.

C.C.P. §1094.5(b) provides for in part:

> The inquiry in such case shall extend to the question whether the respondent has proceeded without or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discre-tion. Abuse of discretion is established if

respondent has not proceeded in the manner required by law....

There are four basic procedural requirements that must be alleged to state a good cause of action for a writ of mandate, and Appellants have alleged them. Namely, they are: no plain, speedy, and adequate remedy; Respondents have a present duty to act; Appellants have a clear, present, beneficial right to relief; and the exhaustion of administrative remedy to the degree possible.

Thus, the courts have been directed to search the administrative proceedings to determine if: they acted without or in excess of their jurisdiction, did they provided a "fair trial," and did they abuse their discretion by not following the law.

The depth of this search spans the total spectrum from "substantial" evidence rule, by supporting the decision with the use of the strict scrutiny rule, an independent judicial review as if in a trial de novo. In the case at bar, it is not subject to debate that Appellants have alleged the unconstitutional taking of their property and the deprivation of their human rights. Also, there cannot be any argument that these rights, as alleged in the Complaint, are "fundamental vested rights," and as such, demand the "strict scrutiny" test and then some, because the Appellants are part of a "suspect class." Adjoining property owners have not had the benefit of the equal protection of the law.

The adjudicative administrative proceedings in this case presents a clear case of a government agency going completely overboard. They have in their acts and omissions exceeded and acted without jurisdiction, the trial was not fair, nor a trial at all, and they violated the law across the board.

The record also makes it painfully apparent that Appellants were substantially and significantly deprived of their fundamental rights and that it had a vital impact on them as individuals as well as the class which they are part of.

The leading cases supporting these propositions are: Berlinghieri v. Department of Motor Vehicles (1983) 33 Cal.3d 392, 395; Strumsky v. San Diego County Employees Retirement

Association (1974) 11 Cal.3d 28; and Bixby v. Pierno (1971) 4 Cal.3d 130, 143.

The case at bar shows no evidence to indicate that the trial court and court of appeal made any independent judicial review of the administrative proceeding that they were to examine with strict scrutiny.

B. The Facts Well Plead are "Admitted" Including the Exhibits.

Where, as in this case, the courts must make an independent judicial review, with strict scrutiny, the procedural device of a demurrer does not present law point exclusively as it does in the ordinary civil action. Sears Roebuck & Co. v. Walls (1960) 178 Cal.App.2d 284, 288.

In addition to all well-plead facts in the Complaint being admitted as true, it also assumes they are true and provable. The Complaint has also incorporated by reference unambiguous written documents of the City. There are three that merit particular attention, namely: (1) the City's Notice of Public Hearing, Exhibit "C" 2(J.A.:426); (2) the City's Agenda for the meeting, Exhibit "D" 2(J.A.:427); and (3) the City's Minutes of the meeting, Exhibit "E" 2(J.A.:429, 432).

Even without reading the Complaints herein and only spending one minute reading Respondents' own documents, Exhibits C, D and E, the following conclusions will be found to be supported by the facts in the record.

1. The City did not have, nor did it acquire, jurisdiction over Appellants or their property in the SMA proceeding.

2. The notice and the "hearing" in reality, a "town hall meeting" and attending and speaking at said meeting, do not meet the due process requirements of the Horn court.

The Horn court on page 617 says: "that the notice must at a minimum be reasonably calculated to protect their interest." On page 620, it concluded, "the notice received by the plaintiffs obviously led to no meaningful vindication of his due process rights."

The Agenda (Exhibit "D") entitled "Meeting" and not hearing or trial, shows on its face, that this was at best a "town

hall" type meeting (and one that was tightly controlled). The Horn opinion on page 619 states what they think about this type of "hearing": "The C.E.Q.A. procedures are intended only to make and record a public response limited to general environment aspects of a proposed project. In order to satisfy the due process requirements, it is necessary to have a hearing where specifications to the threatened interference with the property may be raised. "In a predeprivation hearing, it would be reasonable and necessary to have expert testimony from environmentalists as is the nature and extent of the impact and also a real estate expert appraiser to give their opinion as to the effect of this threatened interference on the market value of the property in question. The court is requested to note from page 5 of Exhibit "E" [2(J.A.:432)] the type of general opinion that was requested and permitted.

As the Horn case points out on page 617, "that this type of meeting cannot focus on the individual concerns of persons who are peculiarly and directly affected."

The court of appeal disposed of Appellants' Complaint for a writ of mandate on page 15 holding, "Thus, to the extent they have been deprived of a significant property interest, they received sufficient notice and opportunity to be heard." The court then went on to exasperate this startling conclusion by citing the Horn case. The Horn case is very much like the case at bar in all material respects. However, the evidentiary facts in the case at bar establish beyond a reasonable doubt that the process Appellants received was the antithesis of the due process criteria articulated by the Horn court.

The Horn court also puts to rest Respondents' often used argument that the "statute so provides" by saying at page 616 "... the due process requirement discussed herein are not rooted in the statute but are compelled by a stronger force of constitutional principle."

These and other putative defenses of the Respondents cannot be raised by a demurrer. They are affirmative defenses. Further, the City can no more deny their own documents any more than they can impeach their own witnesses. They ought to be estopped from offering "proof" that contradicts their own

documents. A pre-deprivation hearing requires nothing less than a judicial due process hearing.

In passing, their argument that the taking in this case is a private taking, is expressly refuted by Exhibit E, page 2 [2(J.A.:429)], wherein the City's employee testified that: "The original proposal came in with an access off Alicante Road; however, for traffic safety purposes, staff requested that the entrance be moved to Corté de la Vista." How can it be argued, (and successfully too?) that "traffic safety purposes" is not a public use and purpose on public streets and central to the governmental improvement.

How, indeed, can this whole judicial review proceeding be said to comply with the correct standard of the scope and depth that must be accorded to these proceedings. Not only did the administrative agency go astray, but the courts failed in their judicial review.

Not only does the City's employees testimony establish conclusively that the taking was for a public purpose (and admittedly for a laudable purpose) but is also establishes that the city did indeed, engage in the regulation of traffic. Appellants' complaints and exhibits establish, without being contradicted, that the City acted without and in excess of its jurisdiction by engaging in vehicular traffic control being expressly prohibited by the terms of the California Vehicle Code §21. Rumford v. City of Berkeley (1982) 31 Cal.3d 545. Only if the City could show by an affirmative defense that they acted within an express exemption in the statute, which they have not done nor can they.[4] The Complaint states that they failed to provide the appropriate notice and hearing, to provide a trial at all, and further abused their discretion by not following the law. This

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4 California Vehicle Code §§21, 2100-21116 et seq. and §§22, 627, 21102, 21111, 22352 and 22357; Hutchinson v. City of Sacramento (1993) 17 Cal.App.4th 791, 794; Los Angeles v. So. Calif. Building & Loan Assn. (1961) 188 Cal.App.2d 850, 855. In addition to the notices and hearing required by the Traffic Code, the change in the traffic required an amendment.

was repeatedly called to the attention of the court and yet their judicial review failed to have them set aside the proceeding as being null and void. The courts, as well as Respondents, just completely ignored these and other like objections to the general plan. This also, in turn, requires notice and at least one more public hearing.[5]

Lastly, Government Code §66499.37, being a truncated, non self-executing, statute of limitations, that bars claims and therefore, notice of it must be given, and if not, it is unconstitutional on its face and as applied. In light of Tulsa v. Pope (1988) 485 U.S. 478, haw can the court of appeal say that this objection is "without merit"?

The standard of judicial review, explicitly codified by C.C.P. §1094.5(b) was either ignored or not correctly applied in this case.

III.

THE LOWER COURTS IN THIS CASE OWING TO A MISTAKE OF LAW AND MISREADING OF THE FACTS COMMITTED PREJUDICIAL ERROR IN REVIEWING THE GENERAL DEMURRER

A. Generally.

The recent case of Yee v. Auburn (1992) 3 Cal.App.4th 771, provides us with a current and clear statement of the law for the judicial review of a demurrer to a cause of action for inverse condemnation.[6]

B. Review of a Federal Cause of Action.

In Bach v. County of Butte (1983) 147 Cal.App.3d 554, the court also clearly and concisely sets forth the standard of review

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5 Government Code §65353, §§65090-65092, 65354.5, 65355, 65318, 65919, 65357; 65858, 80 Opinion of Attorney General 310 (1983), 65862, 65303, and 65302(b). See also, Guardians of Turlock's Integrity v. Turlock City Council (1983) 149 Cal.App.3d 584, 592, 593; Friends of "B" Street v. Hayward (1980) 106 Cal.App.3d 988, 999; Save El Toro Assn. v. Days (1977) 74 Cal.App.3d 64, 72, 74.

6 Eldridge v. City of Palo Alto (1976) 57 Cal. App.3d 613, 632.

of an action based on federal statute or constitution. The state must look to federal law to determine what conduct gives rise to an action. The general rule is that state law controls in matters of practice and procedure; however, a "federal right cannot be defeated by the form of the local practice."

C. Federal Cause of Action Which is Based on Claim of Deprivation of Constitutional Rights Under Color of State Law Requires the Application of Federal Law.

Whereas in this case, the Complaint sets forth several causes of action based on section 1983 et seq. of the Federal Civil Rights Act and the Fifth and Fourteenth Amendments which are designed to serve as an antidote to discriminatory state laws, federal law shall be used to test their adequacy. In order to protect federal rights where state processes are available in theory, but not in practice, the application of federal law is mandatory.[7]

Where, as in this case, the Complaints set forth in Count I claims based on Appellants' state and federal constitutional rights that prevent the taking of their property without compensation; and where as in Count III, Appellants based on state and federal law and constitutions, claim the wrongful appropriation of their protected property rights and the deprivation of their human rights which denied them due process and equal protection of the law; and where as in Count IV, containing their Amended and Supplemental Complaints against the City for the deprivation of rights under color of state law [42 U.S.C. §§1883, 1985, 1986 and 1988]; and, lastly as in Count V, their complaint against Fieldstone for the same deprivation as aforesaid, the courts failed to exercise the judicial review required under the law for these type of violations of Appellants' constitutional rights 3(J.A.:542-560; 560-576).

While due process is not in all cases judicial process, where constitutionally protected rights are involved, judicial review must be exercised over administrative proceedings to insure that no citizen is deprived of their liberty, property or property

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7 Williams v. Horvath (1976) 16 Cal.3d 834, 837, 841.

rights. It is a matter of common knowledge which the Court should take judicial notice, that Local administrative tribunals have become insensitive to the fact, that pressure from special interest groups is inconsistent with the proper function of their quasi-judicial capacity and function.

IV.

IF PROCEEDINGS, DECISIONS AND THE LAWS UPON WHICH THEY ARE BASED ARE VOID, FOR ANY REASON, THEY ARE SUBJECT TO BEING COLLATERALLY ATTACKED. IN SUCH CASES, THE STATUTE OF LIMITATIONS IS NOT A DEFENSE, LACHES MAY BE, NOT THE STATUTE OF LIMITATIONS AS A BAR, NEVER.

APPELLANTS' PETITION FOR REHEARING

At pages 23-27:

IV.

THE "NOTICE AND HEARING" GIVEN TO APPELLANTS IN RE: THE TENTATIVE MAP APPROVAL PROCEEDINGS ARE FATALLY CONSTITUTIONALLY FLAWED

From the hearing had and the one and only notice that Appellants received was ostensibly a public hearing, "town hall" type for the approval of Fieldstone's tentative map. The Appellants were not applicants or parties, but appeared as "witnesses" for the City's benefit to be better able to make an informed decision 2(398:10-26); 399; 400, 401:1-10).

The notice was defective 2(426, Exhibit C). Its only caveat: if you challenge the tentative map in Court, you may be limited to the issues raised. Note that it does not limit the issues you may raise in the proceedings relating to the final map approval or claim to be *res judicata*. To non-parties, this would also be so by operation of law 2(403:9-28; 404:1-19).

So far, not so bad. Now, and without further adieu, the Respondents argue that in the "town hall" type meeting, they have provided Appellants with a pre-deprivation hearing, a

hearing adopting new traffic regulations and a hearing to amend the General Plan, the Specific Plan and the Circulation Element. Further, the one notice for the public meeting satisfies the requirements for these three other hearings; and what's more, it satisfies the notice requirement necessary for the truncated statute of limitations to be constitutional. They argue that the one notice for the public meeting satisfies the requirements for these other four notices. Because in theory it is possible that one notice could, in fact, provide a person adequate notice to five or more purposes, we must turn to a copy of said notice 2(426, Exhibit C).

From its examination, it is palpably apparent that the notice is deficient for the following reasons:

(a) as for a notice for the public hearing as hereinabove set forth;

(b) as to the notice to regulate traffic, it fails to meet the requirements of the California Vehicle Code §§21, 21100 et seq. and/or the California Administrative Procedure Act, Government Code §1150(b);

(c) as for the notice required by Government Code §§65300 et seq. for amendments of the general plan;

(d) as for the notice for the predeprivation proceedings, the Horn case, infra, states on page 617, ...prior notice of a potentially adverse decision is constitutionally required, that notice must, at a minimum, be reasonably calculated to afford affected persons the realistic opportunity to protect their interest. "It is submitted that Exhibit "C" is inadequate";

(e) as to the notice necessary to make a truncated statute of limitations that is a non claim, non self-executing statute, as in our case, and as such, requires actual notice of that fact to be given to Appellants, the notice is silent. Therefore, it does not satisfy the due process requirement. Tulsa v. Pope (1988) 485 U.S. 478, 491.[5]

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[5] The Subdivision Map Act (S.M.A.), as well as the City's Code also requires notice in all other proceedings as to all parties except "contiguous property owners" with far less being at risk.

The above authority applied to the Complaint and Respondents' own documents 2(J.A. 426, 427, 428-437), do not permit any other conclusion than the notice and hearing totally failed to provide Appellants due process as constitutionally required. The proceedings and decisions relating to the approval proceedings of the tentative map are also unconstitutional and as such are null and void. Appellants cannot be barred by the statute of limitations upon this record. The acts and omissions of the City were without jurisdiction in the traffic management decision in the fundamental sense. The City was in excess and/or without jurisdiction because of the fatal flaws aforesaid in all the above-described proceedings, decisions and laws and therefore are null and void and not subject to the defense of statute of limitations (Appellants' Opening Brief at 18-26; Appellants' Reply Brief at 41-43).

The Court's opinion on page 15 erroneously concludes that "...they received sufficient notice and opportunity to be heard," citing the Horn case as authority. Under no circumstances, can the "notice and hearing" Appellants had, be said to meet the criteria set forth in Horn, for a constitutionally-sanctioned proceeding.

As to Appellants' objections to the traffic regulation adopted and approved by the City, the Court's opinion is silent.

On page 18 of the Court's opinion, footnote 6, the Court makes nodding reference to Appellants' objection relating to the unconstitutionality of the truncated statute of limitations. In light of the fact that the Supreme Court has recently so held in Tulsa v. Pope (1988) 485 U.S. 478, it would appear reasonable that the Court would explain their conclusion that Appellants' objection in this connection is "meritless."

Both the Code of Civil Procedure § 1094.6 and the City's Code expressly require special notice as required herein as applied to all other classes, except as to the rights of contiguous owners.

The Complaints (Second and Third Amended, and Amended and Supplemental) contain the facts to support these objections. The applicable law cited in Appellants' briefs and in

this Petition as applied to the facts in the Complaints, support Appellants' contentions.

For a more recent case applying the Horn Court's holding, see Selinger v. Redlands (1989) 216 Cal.App.3d 259. For a contemporaneous decision relating to "pre-seizure" due process requirements, being analogous to "property pre-deprivation proceedings," see. U.S. v. Daniels (Dec. 18, 1993) 126 L.Ed.2d 490.

Appellants earnestly believe that the Respondents' "speaking" demurrer misled this Court into making errors in the applicable law and misunderstood the facts in Appellants' Complaint and inadvertently relied on Respondents' scenario of the facts.

V.

THE PROCEEDINGS FOR THE APPROVAL OF THE FINAL MAP BASED ON THE ADMITTED FACTS ALLEGED IN THE COMPLAINT AND THE UNAMBIGUOUS LAW RESULT IN THE CONCLUSION THAT SAID PROCEEDINGS OUGHT TO HAVE BEEN ADJUDICATORY

Preliminarily to determining the type of hearings requiring "due process" protection, our Supreme Court examined in detail the rationale of the "legislative-adjudicatory" distinction in its landmark decision of Horn v. County of Ventura (1979) 24 Cal.3d 605 (Horn) and concluded on page 615:

> In therefore rejecting the concept that subdivision approvals are purely 'ministerial' acts requiring no precedent notice or opportunity for a hearing, we thereupon proceed to consider defendants and real party's secondary arguments.

In the Court's analyses, starting on page 612, nowhere do they make a distinction between temporary or final subdivision approvals, or such other labels. The four pages devoted to this

subject demonstrate that it is necessary to examine each case on an individual basis to make this decision. It is clear that on the facts in Appellant's Complaint, the Horn Court would hold that the proceeding to approve the final map was adjudicatory in nature and therefore is subject to procedural due process protection.

The City, in approving the final subdivision map, must comply with all the requirements of the Subdivision Map Act, and in particular, Government Code §§66458, 66473, 66473.5 and 66474.

To believe that Government Code §66474.1 overruled all the provisions of the Subdivision Map Act, particularly the chapters dealing with the procedures and requirements for approval proceeding of the final map is incredulous. It is true that it is ambiguous but rules of statutory construction ought to permit a reasonable interpretation that would give effect to the whole Subdivision Map Act. It would be reasonable to assume that in labyrinth legislative process it became convoluted. It would also be a reasonable interpretation that it was the legislative intent to permit a final approval of the tentative map if it complied with the requirements that were applicable at the time of the tentative map and that a modest modification of the tentative map to the final map shall not be grounds for its disapproval if they are substantially the same.

In our case, it is clear that neither the tentative or final map complied with the requirements of the Subdivision Map Act. The tentative map is not entitled to *res adjudicata* principles against parties, much less witnesses. Youngblood v. Board of Supervisors (1978) 27 Cal.App.3d 644 is no authority to support the Court's ruling. This case stands for no more than the clause that is liberally sprinkled in among the provisions to the Subdivision Map Act: "that it complies to the requirements that were applicable at the time of the approval of the tentative map."

By applying the provisions of the Subdivision Map Act and the City's Subdivision Ordinance, Title 20 of Carlsbad Municipal Code to the facts alleged in the Complaint and its exhibits, it is clear that by following the template of the analyses

that the Horn Court provided us, the proceeding in the case at bar approving the final map had to be an adjudicatory proceeding and subject to procedural due process principles. It necessarily follows that the Appellants sought judicial review by a proper remedy and in a timely manner. Based on the cited law, applied to the facts in the record, Appellants claim that they were deprived of their property, due process and equal protection of the law rights.

It should also be apparent to the Court that both the proceedings and the decision approving the final map to the subdivision are null and void. Thus, Appellants would be permitted to challenge same collaterally, if necessary. From these conclusions, it must also be apparent that defense of the statute of limitations is a "red herring."

From the above, it can be stated that a legislative body (City Council) acting as an administrative hearing tribunal in a subdivision land zoning proceedings is an "adjudicative function." In the Court's opinion on page 15, it was error to find that in this case it was non-discretionary and therefore deny Appellants their property and civil rights.

It was also error for the Court to hold that §66474.1 of the Government Code, effectively made proceedings and decisions "non-discretionary."

In the Court's opinion on page 14, it states, "...we presume the City was required to approve the final map"; this was in error. On the record in this case and the applicable law applied to it, it cannot be presumed that the City was required to approve the final map because the Complaint did not allege that: "the final map was not in substantial compliance with the tentative map." Also, it is an affirmative defense that cannot be established by a demurrer. Attention is respectfully called to the Subdivision Map Act, Title 7, Chapter 3 (Procedures) and Chapter 4 (Requirements).

On page 14 of the Court's opinion it again states in part:

> As the masses contend the harm caused them arises out of the relocation of the access gate as a condition to approval of the tentative map, the crux of their claim is wrongful approval of the tentative map and not the final map.

This statement in form and in substance is in error because it mistakes the law and misunderstands the facts. The facts as alleged in the Complaints do not only not say this, they explicitly state otherwise. Upon close examination, it will be found that the source of the Court's error was relying on Respondents' scenario of the facts and not the Appellants' Complaints.

The relocation of the gate may be shorthand to identify the means used by the City to achieve public safety, however, a full and proper reading of the Complaints show otherwise. If the Complaints were given "a reasonable interpretation, reading it as a whole and its parts in context," it is impossible to arrive at the Court's conclusion. By doing so, it will be found that the crux of Appellants' claim is the injuries caused by the traffic and <u>not</u> the gate.

Because of the above-identified errors and omissions, Appellants have been prejudiced and solicitously request that a rehearing be granted and the Court order the City to set aside its decision.

At pages 19-22:

D. THE TENTATIVE MAP PROCEEDINGS WERE NULL AND THUS CAN BE COLLATERALLY ATTACKED.

1. The factual basis for this conclusion can be supported by reference to the Joint Appendix[9] [footnote omitted in printing]:

Subject	Citation
"Plaintiffs are citizens of the United States..."	2(J.A. 395:6)
"The City is a public entity..." and as such, is a person under the civil rights law.	2(J.A. 396:4,5)
The City acted under color of state law.	2(J.A. 397:10-17)
The Public Hearing was a sham.	2(J.A. 399:10-22)
One-sided hearing.	2(J.A. 400:19-25)
The notice to the multi-faceted hearing was defective; neither the hearing or the notice conform to the standards of the "due process" clause of the Federal or State constitutions.	2(J.A. 404:20-24)
Appellants were deprived of their Federal "due process" and "equal protect" rights under the Federal Constitution.	2(J.A. 404:25-28; 405:1-26)

9 Footnote omitted in printing.

Appellants did not receive reasonable notice or opportunity to be heard prior to the deprivation of its property rights and in violation of its civil rights.	2(J.A. 408:21-24)
Appellants' property and civil rights were denied them in violation of the City's duty.	2(J.A. 411:3-12)
The violations of Appellants' rights were caused by the City's acts and omissions under color of law and in violation of their constitutional rights.	2(J.A. 412-414:1-18) and 1(J.A. 415:4-21)
The City acted under color of state law and violated Appellants' rights as aforesaid causing Appellants damages and said acts are not isolated.	2(J.A. 416:7-28; 417, 418:6-26)
Appellants' right to possession and use of their property is based upon the positive law of California (see Appellants' Reply Brief 13-17) and provides the substantive bases for its claim under the civil rights remedies law.	2(J.A. 411:10-12; 412-415:1-21)
Requirements for approval of the final map, makes it clear that the proceedings are adjudicative in nature.	2(J.A. 408-409:1-20)
Appellants were not parties to the proceedings between the Respondents.	2(J.A. 409:26-28)
The decision to divert traffic was in excess of the City's jurisdiction, counter-productive and inconsistent with the general, special and circulation plan.	2(J.A. 410:17-28, 411)
The City's diversion and funneling the traffic of the 132 project denied Appellants of their civil and property rights.	2(J.A. 415-418:1-18)

The City notice and agenda are prima facie evidence that the notice and hearing did not meet constitutional "due process" and "equal protection" standards.	2(J.A. 426-427)
Tentative map approval was conditional and subject to the requirements of the final map, both of which items required "discretion."	2(J.A. 400:26-28, 401:1-7)
The City ordinance made it mandatory for them to provide a notice and hearing where you "shall be heard" and "discretion" shall be used.	2(J.A. 397:23-27); 2(J.A. 398:1-13)
DESCRIPTION OF THE HEARING	2(J.A. 399-407:1-10)

2. The notice and hearing that were had did not comply with the due process requirements of the constitutions.

3. The nature and extent of the proceedings were such that Appellants, under the law, were entitled to at least four more notices and three more hearings.

4. *Vehicle Code* §§21, 21000 et seq. require a notice and hearing for a traffic regulation proceeding.

5. *Government Code* §§65300 et seq. require a notice and hearing for amendments to the General Plan, Specific Plan, and the Traffic Circulation Plan, which was necessary because the traffic regulation adopted Is in conflict with them all.

6. A Horn-type predeprivation hearing is mandatory in this case. The "town hall" type meeting cannot be claimed to meet those standards or any of them.

7. A notice of the truncated statute of limitations is mandatory in order to meet constitutional standards of due process.

8. Contiguous homeowners that have claims resulting from new subdivisions are discriminated against and do not receive the equal protection of the law that they are entitled to in the SMA, City subdivision ordinance, C.C.P. §§1094.5 and 1094.6.

9. In addition to giving rise to a cause of action for the deprivation of their civil ris, for a writ of mandate for taking, it also gives rise to a cause of action for a due process taking.

10. Importantly, it also permits Appellants to collaterally attack the proceeding approving the tentative map because they are unconstitutional and null and void.

Authorities in support of this heading and subheadings have been grouped together here for the Court's convenience[10].

E. PROCEEDINGS FOR APPROVAL OF THE FINAL MAP OUGHT TO HAVE BEEN ADJUDICATORY.

1. The tentative map approval was conditional and the requirements of SMA and the City's related subdivision ordinance both make it mandatory that an adjudicatory hearing be had; Chapter 3, §§66451-66472.1 Procedures and Chapter 4, §§66473-66498 Requirements of the SMA.

2. Conditional, tentative map approval where the conditions remain unfulfilled or require judgment to determine if they have been fulfilled, approval of the final subdivision map is not a ministerial act.

3. *Government Code* §§66458, 66473, 66473.5, 66474, among others, all make it mandatory that a tentative map be disapproved.

4. Respondents claim and the court agreed, that the final map proceedings were ministerial, based on *Government Code* §§66474.1 and the Youngblood case is erroneous.

5. The subsection in question is ambiguous. It can only reasonably be interpreted to mean that the final map should be approved if it complies with all the requirements in force at the time of its approval. This is all the Youngblood case holds.

6. The startling proposition that this subsection makes it mandatory for the City to approve the tentative map, in this case, cannot be substantiated by the law, facts or reason. It cannot be said the it repealed the procedures and requirements of the SMA 2(J.A. 401: 26-28; 402: 1-19; 405: 22-26; 408; 409: 21-25).

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10 Footnote omitted in printing.

7. The Horn court would not find that these proceedings were ministerial.

8. The proceedings approving the final map are clearly adjudicative. That being the case, the Appellants filed for judicial review in a timely manner. Again, the statute of limitations defense is inapplicable 2(J.A. 408: 25-28).

V. INDEMNITY, IMMUNITY AND INTENTION

APPELLANTS' PETITION FOR REHEARING

At pages 36-40:

VIII.

REASONABLE NOTICE IS THE CORNERSTONE OF DUE PROCESS "Intention-Indemnification"

There is consensus among the commentators and the Courts that "notice" is the essence and the *sine qua non* of due process. It is indisputable that Appellants did not receive reasonable and adequate notice. For Respondents to argue that Appellants received such notice because Appellants received and responded to the "Notice of Public Hearing" is disingenuous at best. It proved to be worse then no notice, because it was false and misleading.

Due to an honest error on the part of Appellants, Government Code §66451.4 was cited three times in their Reply Brief. Within a few days after filing said brief, it was discovered that said statute had been repealed. Within eleven (11) days of filing said brief, the Court was notified in writing (in Appellants Request for Oral Argument) of this oversight. Appellants apologize if this has caused the Court any inconvenience. It is not believed anyone was prejudiced by Appellants' oversight.

Prior to its repeal, said statute provided for in words and figures as follows:

> **§ 66451.4. Notice of application to owners within 300 feet**
>
> (a) In addition to the notice required by Section 66451.3, whenever approval of a tentative map will

> constitute a substantial or significant deprivation of the property rights of other landowners, the local agency shall provide notice of the application to all persons, including businesses, corporations, or other public or private entities, shown on the last equalized assessment roll, as owning real property within 300 feet of the property which is the subject of the application.
>
> . . . .
>
> (c) Nothing contained in this section shall preclude a local agency from providing additional notice by other means, not shall the requirements of this section preclude the local agency from providing the necessary notice at the same time and in the same manner as public notice otherwise required by law for such project. (Added by Stats. 1980, c.1154, p. 3808, §1, eff. Sept. 26, 1980.) (Emphasis added.)

By virtue of the date of this statute, when it was adopted and its language, it is reasonable to assume that it was the legislature's intent to codify the holding of the Horn Court, infra. Of greater significance to our case is, what was the legislative intent in repealing said statute two years later? To answer this question, research was initiated by Appellants and the services of "Legislative Intent Service"[5] (LIS) was sought. By examination of legislative documents which were generated before, during and after the bill in question moved through the legislative process, it was the conclusion of the LIS and Appellants, that based on the examination of said documents, the following is true: that the California Chapter of the American Planning Association (APA) was the prime mover of the repeal of Section 66451.4 of the Subdivision Map Act on the grounds that said section was redundant, duplicative and inconsistent. That said APA was supported by the California Chapter of the American Planning Association, the California

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5 Footnote omitted in printing.

Association of Realtors and the California Building Industry Association, also known as the BIA.

The reason advanced by these special interest associations, to urge the legislature to repeal this notice provision, were and are false on the face of the Subdivision Map Act.

The fact that this statute was repealed does not affect the merits of our case. It's repeal is not a constitutional amendment nor did it overrule the Supreme Court. The "taking" clause and the "due process" clause still stand as does the Horn case.

The issue of notice legislation is related to the issue of indemnification because of the inextricable and close relationship between the developer and the City in land regulation matters. In examining the City's requirement under the Subdivision Map Act, for approval of a developer's final map, we noted that Government Code §66474, requires that the City must deny approval if certain enumeration criteria are not met. The same section under subsection §66474.9 provides for an exception to the general rule that the City cannot require as a condition for the approval of a map of the developer, to defend, indemnify or hold the City harmless for its conduct in the approval or disapproval proceeding. The general rule is designed to prevent the City from shifting its financial responsibility for its errors and omissions to the developer who has most to gain from these oversights. The City exists for and as a representative of its citizens. Because of its very close relationship with the developer, conventional wisdom is that the general rule will prevent or reduce the risk of collusion, corruption and conduct that is detrimental to the citizen's confidence in fair and equal enforcement of state and federal laws. In 1986, the legislature, for reasons not apparent in the legislation itself, provided the developers an exception to the general rule of prohibiting the developers from indemnifying the City (perhaps the legislative intent could be determined by searching for clues among the "paper trail" for the legislative process). The exception that the legislature gave to the developer did however contain two qualifications, one explicit and the other implicit. The explicit qualification to approval of an indemnity agreement between developer and the City is

contained in subsection (b)(1) and provides, in substance, that the action must be one which ". . . is brought within the time period provided for in Section 66499.37."

The implicit qualification is that the indemnification can only apply to misfeasance, not malfeasance. The Appellants raised this issue in their brief because it was apparent that there existed in this case an indemnification agreement between the City and Fieldstone, which was corroborated by Fieldstone's lawyer, also representing the City. Appellants dismissed the idea of a conflict of interest on the stated reason that Richard A. Schulman was with a respectable firm and would not knowingly engage in any unethical or illegal conduct.

Because of the Respondents' insistence that Appellants' claim was not filed within the time period provided for in Section 66499.37 and further because now it clearly appears that the acts of the City were wrongful acts without any legal right (malfeasance) and that Fieldstone cannot legally indemnify the City because it is not only unethical, but illegal.

That Courts are not to sit as super legislatures to debate and determine the wisdom, desirability or propriety of statutes like the exemption to the general prohibition of indemnification of cities by developers. However, when that statute is interpreted as permitting acts by the city that are without or in excess of their jurisdiction or malfeasance, then that statute must be repealed on the grounds that it contravenes a strong public policy. Accordingly, if such construction is adopted, this Court should strike it down. On the other hand, if this Court strictly construes the statute, as it should being in derogation of the common law, it should hold the indemnifi-cation agreement between the Respondents, invalid as not falling within the exemptions and, is also against public policy. In either event, the Respondents cannot legally or even ethically be represented by the same attorneys. This is based on the strong public policy of minimizing the cities from being influenced by corruption.

Based on the facts in the Complaint (close relations and nature of the City's conduct) and the record as a whole, the Respondents cannot have an indemnification agreement between them or be represented by the same attorneys. Topanga

Association v. County of Los Angeles (1989) 214 Cal.App.3d 1348.

PETITION FOR REVIEW OF DECISION BY THE COURT OF APPEAL FOURTH APPELLATE DISTRICT [DIVISION ONE] FILED JUNE 17, 1994

At pages 16-17:

B. THE GOVERNMENT IMMUNITY IN CIVIL CODE §3482 IS NOT APPLICABLE TO FIELDSTONE'S BREACH OF DUTY TO APPELLANTS AS ALLEGED IN COUNT II.

1. Case law uniformly hold that the immunity only applied, if at all, to governmental agents and other entities in privity with them.

2. The cases are also unanimous, that if a statute is applicable, it is limited to "reasonable" nuisances, both in the manner caused and the nature of the injury inflicted.

3. In any event, the government cannot claim the immunity if conduct effected a taking of private property without compensation. It would be unconstitutional.

4. If the government cannot claim the statutory immunity, it cannot be claimed by non-governmental agencies, even if they were in privity. Derivative immunity right cannot be greater than its origin.

Authorities in support of this heading and subheadings are grouped together here for the Court's convenience[5].

---

5 Orpheus Building Co. v. San Francisco Bay Area Rapid Transit Dist. (1978) 80 Cal.App.3d 863; Greater Westchester HOA, infra; Hassell v. San Francisco (1938) 11 Cal.2d 170, 171 ("particularized inquiry into each statute").

APPELLANTS' REQUEST FOR ORAL ARGUMENT

In compliance with the Court's request, the appellants and each of them do hereby respectfully request that this case be placed on the calendar for oral argument. They believe that oral argument will materially add to what is now before the court for the following reasons:

1. Government Code §66451.4 provided for notice to adjacent landowners whenever the approval of a tentative map will constitute a substantial or significant deprivation of their property rights. Added by Stats 1980, Ch 1151 §2, ch 1154 §1 effective September 29, 1980;

2. From its language and its timing it appears to be in direct compliance with the holding in Horn v. Ventura County, 24 Cal.3d 605 (1979);

3. Because legislative history of a bill is frequently revealing as to the legislative intent, appellants', subsequent to the filing of their Reply Brief, initiated research to that end;

4. The best source, and at times the only source, of legislative history is located in Sacramento. Research to date has only revealed that said section was repealed by Stats 1984 Ch 1009 §31;

5. Because the results of full research as to both the adoption and the repeal of this section may add materially to what is presently before the court, this is one of the reasons oral argument is being requested.

6. In the administration of justice, no better way has been devised to determine the truth than the adversarial system;

7. The respondents have failed to join issues based on the facts alleged in the complaints and the issues presented in Appellants' Brief;

8. Only toe to toe confrontation between the parties on the issues, determined by the Court's questions, can accomplish this in the current state of the record now before this Court, and is the second reason to request oral argument;

9. Lastly, oral argument would also afford the appellants the opportunity to emphasize the values of properly

designed and correctly applied constitutionally sanctioned predeprivation proceedings to all parties concerned;

10. The predeprivation proceeding would be much less expensive, vexatious and wasteful of valuable resources than this type of litigation, plus, be much more expeditious: and

11. This type of litigation unnecessarily and unfairly increases the already high cost of housing; and

12. It would encourage better community relationship; and fuller participation in government; and

13. Such proceeding would have a salutary effect on the land developers, land planners, "The City," the judicial system and the public; and

14. The proceeding would at the same time protect affected landowners of their Federal and State Constitutional, statutory, and case law, guaranteed rights.

If "Appellants' Request For Oral Araument" is granted, the allotted 15 minutes would be divided equally between opening and closing argument, and subject to the Court's discretion.

PETITION FOR REVIEW OF DECISION
BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT [DIVISION ONE]
FILED JUNE 17, 1994

At pages 23-25:

G. HOMEOWNERS DIRECTLY INJURED BY A NEW SUBDIVISION CONSTITUTE A "SUSPECT" CLASS AND NEED PROTECTION OF THE JUDICIARY.

1. These homeowners are not an organized group and their demographics makes it unlikely that they could be organized. They have no special clout with the state legislature or their local government.

2. The developers are highly organized and well represented in the state legislature[12].

3. Their organizations were the prime movers in causing the repeal of *Government Code* §66451.4, which had codified the Horn due process notice requirements on the false grounds that it was duplicative.

4. The developers also appear to have been responsible for any number of provisions in the SMA that are favorable to the building industry. The provision "liberalizing" the law by permitting them to indemnify the governmental agency from liability associated with land regulation and zoning is a good example.

5. The statute, even as amended, is being violated by the Respondents. Fieldstone, by indemnifying the City and allowing their attorney to also represent them, is not only unethical, but in violation of the law in the following ways.

a. Under no circumstances is indemnification permitted if malfeasance is involved as charged in this case;

b. Under Respondents' theory of the case, the claim was not filed within 90 days, and thus not within the exemption of the general law;

c. Indemnification agreements cannot extend to inverse condemnation damages.

In further support of Appellants' contentions that they are members of a class that has received unequal protection, they set forth the applicable authorities and facts for the Court's convenience[13].

---

12 Footnote omitted in printing.

13 Footnote omitted in printing.

VI. CONFLICTS

PETITION FOR REVIEW OF DECISION
BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT [DIVISION ONE]
FILED JUNE 17, 1994

At pages 19-22:

D. THE TENTATIVE MAP PROCEEDINGS WERE NULL AND THUS CAN BE COLLATERALLY ATTACKED.

For the factual basis and reference to the Joint Appendix, see Part Three, Section IV of this Appendix, at page 129, supra.

E. PROCEEDINGS FOR APPROVAL OF THE FINAL MAP OUGHT TO HAVE BEEN ADJUDICATORY.

For the factual basis and reference to the Joint Appendix, see Part Three, Section IV of this Appendix, at page132, supra.

VII. FACTS AND ISSUES

PETITION FOR REVIEW OF DECISION BY THE COURT OF APPEAL FOURTH APPELLATE DISTRICT [DIVISION ONE] FILED JUNE 17, 1994

At pages 23-25:

F. ASSUMING, *ARGUENDO*, THAT THE PROCEEDING, DECISIONS AND LAWS ARE SUBJECT TO THE STATUTE OF LIMITATIONS DEFENSE, THE APPELLANTS HAVE RAISED NUMEROUS REASONS, ANY ONE OF WHICH WILL BAR ITS USE.

1. Without waiving the other "bars" to the statute of limitations defense, the Appellants call the Court's attention to Pierpont, infra. The material facts and issues are the same as in the case at bar, and the doctrine of "judicial suspension" being based on good logic and reason, the case is dispositive of the putative defense of the statute of limitations[11].

---

[11] Preliminarily to determining the type of hearings requiring "due process" protection, our Supreme Court examined in detail the rationale of the "legislative-adjudicatory" distinction in its landmark decision of Horn v. County of Ventura (1979) 24 Cal.3d 605 (Horn) and concluded on page 615:

> In therefore rejecting the concept that subdivision approvals are purely 'ministerial' acts requiring no precedent notice or opportunity for a hearing, we thereupon proceed to consider defendants and real party's secondary arguments.

In the Court's analyses, starting on page 612, nowhere do they make a distinction between temporary or final subdivision approvals, or such other labels. The four pages devoted to this subject demonstrate that it is

2. The Nestle case, infra, had earlier held "that every repetition of the wrong may create further liability," thereby indicating that in continuing injury cases that statute of limitations may never be a defense so long as they are continuing.

G. HOMEOWNERS DIRECTLY INJURED BY A NEW SUBDIVISION CONSTITUTE A "SUSPECT" CLASS AND NEED PROTECTION OF THE JUDICIARY.

1. These homeowners are not an organized group and their demographics makes it unlikely that they could be organized. They have no special clout with the state legislature or their local government.

2. The developers are highly organized and well represented in the state legislature[12].

3. Their organizations were the prime movers in causing the repeal of *Government Code* §66451.4, which had codified the Horn due process notice requirements on the false grounds that it was duplicative.

4. The developers also appear to have been responsible for any number of provisions in the SMA that are favorable to the building industry. The provision "liberalizing" the law by permitting them to indemnify the governmental agency from liability associated with land regulation and zoning is a good example.

5. The statute, even as amended, is being violated by the Respondents. Fieldstone, by indemnifying the City and allowing their attorney to also represent them, is not only unethical, but in violation of the law in the following ways.

---

necessary to examine each case on an individual basis to make this decision. It is clear that on the facts in Appellant's Complaint, the Horn Court would hold that the proceeding to approve the final map was adjudicatory in nature and therefore is subject to procedural due process protection.

12 Their lobbyists need no introduction. The political action committee has already attended to this formality.

a. Under no circumstances is indemnification permitted if malfeasance is involved as charged in this case;

b. Under Respondents' theory of the case, the claim was not filed within 90 days, and thus not within the exemption of the general law;

c. Indemnification agreements cannot extend to inverse condemnation damages.

In further support of Appellants' contentions that they are members of a class that has received unequal protection, they set forth the applicable authorities and facts for the Court's convenience[13].

---

13 From documents that were used in the legislative process, it is clear that the developers were directly responsible for the repeal of *Government Code* §66451.4, which provided for the constitutionally sanctioned proceeding articulated by the Horn court and the "liberalization" of indemnification agreement between them and governmental agencies. Topanga Association v. County of Los Angeles (1989) Cal.App. 1348; Greater Westchester HOA, infra (indemnification agreements between City and their privy in land regulation matters cannot extend to damages in inverse condemnation).

The close relationship between Fieldstone and the City has been alleged in the Complaints. The following examples support Appellants' case. 2(J.A. 399:6-10, 400:19-25, 402:20-28, 416:25-28;, 417) and 3(J.A. 549:3-7, 561:1-11, 570:8-11, 19-22).

VIII. AMENDED AND SUPPLEMENTAL COMPLAINT

APPELLANTS' OPENING BRIEF

At pages 47-49:

F. THE COURT'S ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE THE AMENDED AND SUPPLEMENTAL COMPLAINT WAS A PREJUDICIAL ABUSE OF DISCRETION WHERE THE RECORD SHOWS CLEARLY THAT §§464, 373 AND 576 OF THE CODE OF CIVIL PROCEDURE PERMIT SUCH FILINGS.

Page limitations prevent plaintiffs-appellants from developing this argument in full. Of necessity, the following outline consisting of headings will have to suffice.

1. That the plaintiffs in good faith filed their amended and supplemental complaint without leave of court based upon a mistake of fact that the trial court had stated that leave of court was not necessary to file an amended complaint based on a new theory of recovery (J.A. 496: 10-23).

2. But for plaintiffs' mistake, they would have attempted to obtain leave of court to file said amended and supplemental complaint, and if granted, said complaint would have been pending and undisposed of on the merits when the trial court ruled that plaintiffs' action be dismissed. Under those circumstances, the court by applying the principles of law that require "all issues on the merits be resolved" and that there be but "one final order," would not have dismissed the action without first disposing of the issues of law on the merits of said amended and supplemental complaint.

3. C.C.P. §472 - may amend any pleading, once of course, before answer or even after demurrer if before the trial of the issue of law thereon. C.C.P. §4 - ". . . The code . . . And

its provisions and all proceeding under it are to be liberally construed . . . To promote justice." C.C.P. §576 - the court may allow an amendment at any time "in the furtherance of justice." The court's power to amend is to be liberally exercised so that the cases may be decided on the merits.

4. The plaintiffs-appellants exercised due diligence in filing motion for relief and there has been no prejudice to the defendants-appellees and none even alleged (J.A. 535: 5-7; 578: 1-11).

5. On October 15, 1992 the trial court ruled on its own motion to strike plaintiffs' amended and supplemental complaint on the grounds that it was filed without leave of court (J.A. 640). In the same ruling it also denied defendants' request for sanctions against the plaintiffs for filing said complaint without leave of court. Implicit in said ruling is that plaintiffs were in good faith and without any improper motive, and accordingly should be granted the right to file, etc.

6. In any event because said complaint presents a novel question it should be allowed to be filed (J.A. 542-576).

The factual bases and the legal foundation for the above propositions can be found on the following pages of the Joint Appendix: (532; 533; and 534: 1-7) (471; 494) (528, 530) (532, 542, 577). This is provided for the Court's convenience only if it chooses to examine them and is not meant to be an "invitation," incorporation by reference, or any other form of impropriety or imposition.

IX. CONSTITUTION OF THE UNITED STATES IS THE SUPREME LAW OF THE LAND

APPELLANTS' PETITION FOR REHEARING

At pages 41-43:

IX.

RESPONDENTS ARGUE IN FAVOR OF A STRONG POLICY OF STRICT ENFORCEMENT OF THE STATUTE OF LIMITATIONS AND IN FAVOR OF FREE ENTERPRISE. IN THIS, THE PARTIES CONCUR. HOWEVER,"THE ARGUMENT IGNORES THE ESSENCE OF PLAINTIFF'S COMPLAINT, WHICH IS THAT THESE VERY PROCEDURES WERE CONSTITUTIONALLY INADEQUATE." (HORN 611)

Not all rights are equal. There are normative standards, statutory law rights, common law rights and constitutional rights. Constitutional rights are our fundamental rights and the pinnacle in our hierarchy of laws. Not even, all constitutional rights are the same. The rights to protect our life, liberty and property from the inherent excesses of our governments is the apogee of the constellation of the rights of citizens to protect themselves against their government's action. The constitutions are not just parchment relics enshrined in a glass case for display in archives. Nor are they just to be used for inspirational Fourth of July speeches. They are working weapons against the tyranny of the majority, the government. The judicial policy doctrines of "abstention," of constitutional issues, if a case can be decided on a non-constitutional basis, cannot be used by the Court to ignore a citizen's complaints of abuse and deprivation by their government.

The recent case of Healing v. California Coastal Commission (1994) 22 Cal.App.4th 1158, the Court stated:

> It is the nature of our work that we see many virtuoso performances in the theater of bureaucracy but we confess a sort of perverse admiration for the commission's role in this case. It has soared beyond both the ridiculous and the sublime and presented a scenario sufficiently extraordinary to relieve us of any obligation to explain why we are reversing the judgment on Healing's mandate petition. To state the Coast Commission's position is to demonstrate its absurdity."

Healing's "long-term nightmare" bares close resemblance to the abuses and deprivation that the Respondents are doing to the Appellants. It is straight out of Kafka.

These type of excesses are not new. In 1742, Montesquieu said:

> "There is no crueler tyranny than that which is perpetrated under the shield of law and in the name of justice."

Our founding fathers, who were students of other Great Books were well aware of the dangers of the assumed power of government and the need to provide protection to "We the People." Injustices like these have a coercive and destructive effect on the delicate fabric of our society. The respect the law deserves and which the people want to give it, has been in steep decline in recent years. Only two weeks ago last Friday, we had displayed on our television screens the spectacle of a known "fugitive of the law," being pursued by the police, and hundreds of thousands of citizens, who lined the freeways encouraging him to escape the law, of which they obviously have no respect for, with cheers of "go O.J., go." Not a pretty picture.

It is not a condition that will go away soon. It happened in increments of injustice. It will only be corrected by doing justice to the citizens, to regain their respect for the law. It can still be regained, but not overnight. It must be earned by example of citizens being able to fight City Hall successfully with a certain and speedy remedy for real abuses and deprivation of their civil and property rights.

PETITION FOR REVIEW OF DECISION
BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT [DIVISION ONE]
FILED JUNE 17, 1994

At page 25:

H. THE CONSTITUTIONS ARE THE SUPREME LAW OF THE LAND!

1. The supremacy of the federal Constitution is acknowledged and confirmed by the California Constitution in Article III, §1.

2. The Horn case, infra, at page 616 states:

> ...[T]hat the due process requirements discussed herein are not rooted in statute but are compelled by the stronger force of constitutional principle.

The argument relating to the merits has been limited merely to demonstrate that there exists a fair probability that they will be sustained if review is granted. The argument was not made as a reason for review, but only as assurance that if review is granted, it will not be a mere academic exercise.

(4)

No. 94-1018

Supreme Court, U.S.
FILED
DEC 28 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

THOMAS A. MASS, pro se, and JANET A. MASS,

Petitioners,

v.

CITY OF CARLSBAD, a Municipal Corporation, and FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP, a California Limited Partnership,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Fourth Appellate District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED

Respondents confess to some confusion as to the meaning of Petitioners' "Questions Presented." Respondents offer the following statement in an effort to clarify the issues, pursuant to this Court's Rule 24.2:

I. Can a city's approval of a private subdivision make it liable to a neighbor for damages for inverse condemnation?

A. Does the city's regulatory approval of a private subdivision transform the private project into a public project?

B. Does the city's imposition of a condition through its police powers transform the private project into a public project?

II. Does the approval of a private subdivision deprive neighboring property owners of property without due process?

A. Do property owners have a vested property right in the zoning regulations previously applied to neighboring property?

B. Do property owners have a vested property right in the amount of traffic using a public street to be used by a neighboring subdivision?

III. Does California's subdivision procedure, as applied in this case, deprive neighboring property owners of procedural due process?

QUESTIONS PRESENTED – Continued

A. Are neighboring property owners entitled to notice of a hearing at which any decision to be made is ministerial, when they had already received notice of the preceding discretionary hearing?

B. Must a city advise a resident of the statute of limitations for suing it?

IV. Has the Petition raised any other federal issue?

A. Is California's subdivision procedure a matter for federal regulation?

B. Are local nuisances subject to federal regulation?

C. Is there a federal interest at stake when a developer's attorney defends a city's approval of the developer's private project?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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Vehicle Code: §21.

Because of the length of these provisions, the texts of those statutes not already provided by Petitioners are printed in a separate Appendix.

STATEMENT OF THE CASE

Judgment was entered after demurrer, so Respondents will take the following facts from the various complaints, assuming the validity of those facts for now. Respondents reserve their right to contest the allegations should this matter return for trial. Citations to Petitioners' Appendix will be in the form "P.A. [Volume #:

page]," with paragraph numbers where available. Citations to the Petition will be in the form "Pet. [page]."

Petitioners Thomas and Janet Mass live in Respondent City of Carlsbad (the "City"). (P.A. I: 1, ¶1) The south side of their property borders Corte de la Vista (P.A. I: 1, ¶2), a public street (P.A. I: 4, ¶14) that also borders a residential housing development (the "Project") being built by Respondent Fieldstone/La Costa Associates Limited Partnership ("Fieldstone") (P.A. I: 2, ¶5). When Fieldstone originally proposed the Project, it was to take access from Alicante Road (P.A. I: 2-3, ¶10), another nearby public street (P.A. I: 4, ¶14). However, the City conditioned approval of the Project on access coming from Corte de la Vista (P.A. I: 2-3, ¶10), the street shared with Petitioners. The City required this for public safety. (P.A. I: 3, ¶10)

Petitioners' home enjoys a panoramic view and pleasant breezes. (P.A. I: 2, ¶4; P.A. I: 4, ¶16) They paid a premium for this site (P.A. I: 7, ¶25(d)) based on their expectation that the Project would take access from Alicante Road, farther to the west (P.A. I: 4, ¶16; P.A. I: 10, ¶41-¶42). However, having the Project take access from Corte de la Vista will cause problems associated with traffic and new development, including intangibles such as noise and tangibles such as dust. (P.A. I: 4-5, ¶15-¶18) Petitioners believe that these problems constitute an uncompensated taking of their property. (P.A. I: 6, ¶24) Their first cause of action thus seeks a delay in development of the Project as well as compensation from the City for inverse condemnation. (P.A. I: 1; P.A. I: 9)

Construction of the Project began in August 1991 "with 'The City's' full authorization, direction and approval." (P.A. I: 10-11, ¶46) Construction noise, odors and dust allegedly constitute a nuisance. (P.A. I: 11, ¶46) In addition, the traffic and other problems associated with the completed Project, caused by the location of the Project's access, are expected to be permanent nuisances. (E.g., P.A. I: 12, ¶54) Petitioners' second cause of action seeks damages and other remedies against Fieldstone for nuisance. (P.A. I: 9; P.A. I: 16)

The City Council held a public hearing to decide whether to approve the tentative subdivision map. (P.A. I: 17-18, ¶82-¶87) Petitioners received notice of this hearing (P.A. I: 17, ¶81; P.A. I: 32), but allege that the notice was defective because it failed to inform them of the statute of limitations to challenge approval of the tentative map and that subsequent approval of a "final map" for the Project was ministerial. (P.A. I: 20, ¶91) Petitioner Thomas Mass appeared at the hearing and objected to relocating the Project's access. (P.A. I: 18, ¶84-¶85) Nevertheless, the Council approved the Project's tentative subdivision map on January 8, 1991. (P.A. I: 19, ¶87) The Council approved the final subdivision map on September 3, 1991, without further notice to Petitioners. (P.A. I: 19, ¶87) The third cause of action seeks to overturn the various approvals of the Project. (P.A. I: 17; P.A. I: 25-26)

Petitioners also tried to inject a civil rights claim into the case. Their proposed fifth (amended and supplemental) complaint alleged that the design, approval, and development of Fieldstone's Project violated their civil rights. (E.g., P.A. I: 66, ¶83-¶84, P.A. I: 87, ¶180)

Respondents demurred to each cause of action and moved to strike parts of each complaint; when leave to amend was granted, Petitioners amended their complaint and Respondents demurred again. (P.A. II: 18, 20, 22, 24) The trial court eventually sustained a demurrer without leave to amend. (P.A. II: 29) Petitioners sought leave to file another (the amended and supplemental) complaint and to vacate the order sustaining the last demurrer. (P.A. II: 27, 28) However, the trial court refused to vacate its earlier rulings and denied leave. (P.A. II: 31)

On Petitioners' appeal, the California Court of Appeal, Fourth District, Division One, affirmed most of the trial court's rulings, reversing only the ruling that Petitioners had not stated a cause of action for temporary nuisance arising from construction dust. (P.A. II: 35-36, ¶22-¶25; Pet. 21-35) The Court of Appeal denied Appellants' petition for rehearing. (P.A. II: 36, ¶28; Pet. 36) The California Supreme Court then denied Petitioners' petition for review. (P.A. II: 37, ¶35; P.A. II: 38; Pet. 37)

SUMMARY OF ARGUMENT

Certiorari is inappropriate for three general reasons. First, Petitioners' arguments are contrary to the laws of a consensus among the States, Federal Circuit Courts, and, when it has reached these issues, this Court as well. Second, Petitioners' arguments are contrary to common sense. Finally, many of Petitioners' arguments do not even implicate federal issues.

I. A city's approval of a private subdivision does *not* make it liable for damages for inverse condemnation.

Inverse condemnation only applies to takings resulting from private projects. A city's regulatory approval of a private project, proceeding through the police power, does *not* transform the private project or any portion thereof into a public one.

II. The City's approval of a private subdivision did *not* deprive neighboring property owners of their civil rights. The neighboring property owners have *no* vested property right in either the zoning regulations previously applied to someone else's property or in the amount of traffic on a public street.

III. California's subdivision procedures did *not* deprive Petitioners of due process. The City gave proper notice of its discretionary hearing. Notice of a subsequent ministerial hearing is *not* required. A city need *not* advise a resident of the statute of limitations for suing it.

IV. Petitioners' other issues (e.g., California's subdivision procedure and vehicle regulations) do *not* raise federal questions.

ARGUMENT

I

A CITY'S APPROVAL OF A PRIVATE SUBDIVISION DOES NOT MAKE THE CITY LIABLE TO THE PROJECT'S NEIGHBORS FOR TAKING THE NEIGHBORS' PROPERTY.

Petitioners' most important claim in this case is probably that the City, by approving development of the

Project, "took" their property. They demand compensation for the taking under the Fifth Amendment to the U.S. Constitution and a similar provision of the California Constitution. These provisions prohibit the taking of property for public use without payment of just compensation.

Stating the legal principle explains why Petitioners cannot state a cause of action: An agency's approval of a private development is not a public use. It is simply regulation of a private use, a rule upon which there is consensus. *E.g., Ullery v. County of Contra Costa,* 202 Cal.App.3d 562, 570, 248 Cal.Rptr. 727, 731-732 (1988); *Pepper v. J.J. Welcome Construction Co.,* 73 Wash.App. 523, 530-531, 871 P.2d 601, 606 (1994). Cases finding physical "takings" involved true public projects, such as freeways or a drainage facility. *E.g., Harding v. State of California,* 159 Cal.App.3d 359, 205 Cal.Rptr. 561 (1984); *Wilson v. Ramacher,* 352 N.W.2d 389, 394 (Minn. 1984).

Nor may Petitioners state a claim for a regulatory taking, even if the Project were public. Regulatory "taking" cases involve challenges to conditions imposed on development of one's own property. *E.g., Dolan v. City of Tigard,* ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994). Regulatory taking cases also presuppose regulation not supported by a legitimate state interest or that "denies an owner economically viable use of his land." *Agins v. Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106, 112 (1980). Diminution in property value by itself does not constitute a taking. *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 131, 98 S.Ct. 2646, 2662-2663, 57 L.Ed.2d 631, 652-653 (1978). However, Petitioners alleged that the Project was redesigned for safety

(P.A. I: 3, ¶10), and they still reside in the supposedly "taken" property (P.A. I: 1, ¶1). The agency is also typically immune under tort theories, as well. *E.g., California Government Code* §818.4; *Cootey v. Sun Investment, Inc.*, 68 Haw. 480, 485-486, 718 P.2d 1086, 1091 (1986).

Petitioners argue that the City, by ordering the relocation of access to the Project, transformed the Project, or at least its access, into a public project which physically invades their property. Petitioners' argument has no support in case law; what may be more important is that it has no support in common sense. Will Fieldstone be allowed to sue the City for approving the tract in which Petitioners live? After all, Petitioners cast dust and impose noise upon Fieldstone's land each time they work in their yard or drive their car. Will Petitioners sue the City each time a car passes by on Corte de la Vista? After all, the car generates the same pollution that led to this action, and the City accepted the street into its public system.

Petitioners' rule would also be contrary to the needs of the public. As this Court knows, development (and, generally, much economic activity) is subject to detailed regulation. If regulation of a private development turns any aspect of it into a public project, then liability could be imposed on public agencies for virtually every exercise of their police powers. Cities could be held liable by neighbors for approving a development at a greater intensity than the neighbors had expected, or, as here, with a different configuration than the neighbors had expected. This is neither expected nor reasonable. Because case law has already rejected Petitioners' claims, involvement by this Court is unnecessary.

II

THE CITY'S APPROVAL OF THE PRIVATE PROJECT DID NOT DEPRIVE NEIGHBORING PROPERTY OWNERS OF THEIR CIVIL RIGHTS.

Petitioners claim they were deprived of federal civil rights. Such claims require the loss of a cognizable property interest, which typically arise from state law. *E.g., Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561 (1972). However, case law holds that neighbors (Petitioners) lack any right in zoning for other person's (Fieldstone's) property; indeed, no one has a right even in the zoning of one's own property. *E.g., Wheeler v. Gregg*, 90 Cal.App.2d 348, 365, 367, 203 P.2d 37, 48, 49 (1949); *Love v. Navarro*, 262 F.Supp. 520 (C.D.Cal. 1967); *Agins, supra*, 447 U.S. at 260-262, 100 S.Ct. at 2141-2143, 65 L.Ed.2d at 111-113 (mere enactment of zoning does not usually result in taking; must submit development plan); *Muckway v. Craft*, 789 F.2d 517 (7th Cir. 1986) (failure of agency to enforce zoning ordinance against neighboring property does not support Constitutional claim). As this Court observed long ago about the police power:

> A vested interest cannot be asserted against it because of conditions once obtaining. [Citation omitted.] To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress. . . . The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus. *Hadacheck*

v. Los Angeles, 239 U.S. 394, 410, 36 S.Ct. 143, 145, 60 L.Ed. 348, 356 (1915).

Petitioners claim to have suffered a "traffic servitude" over Corte de la Vista. (Pet. 4) Besides being a matter of state law, this claim is invalid. Both Corte de la Vista and Alicante Road are public roads. (P.A. I: 4, ¶14) No one can own a private right in a public road; more specifically, there is a consensus that, other than a significant impairment of access, private persons have no actionable interest in the volume of use of a public road. *E.g., Filkins v. State*, 311 N.Y.S.2d 154, 63 N.Y.Misc.2d 380 (1970) (no right to prevent road construction which would increase traffic); *Troiano v. Colorado Department of Highways*, 170 Col. 484, 495-497, 463 P.2d 448, 453-454 (1970) (harm to business from reduction in traffic); *Division of Administration v. Capital Plaza, Inc.*, 397 So.2d 682, 683 (Fla. 1981) (same); *City of Memphis v. Hood*, 208 Tenn. 319, 323-327, 345 S.W.2d 887, 889-890 (1961) (same). It was the access to Fieldstone's Project that was moved, and that access was "moved" only on a planning map; it had not yet been built when it was "moved." (P.A. I: 2-3, ¶10) Petitioners suffered no harm.

Petitioners have made it clear that it is the location of access to Fieldstone's Project that is the gravamen of their complaint. (E.g., P.A. I: 6, ¶24; P.A. I: 15-16, ¶75-¶76; Pet. 3 ["had no objection to the proposed subdivision"]) They have no cognizable interest in the zoning or design of Fieldstone's Project. Petitioners' entire case rests on a "right" they do not have.

III

CALIFORNIA'S SUBDIVISION PROCEDURES HAVE NOT DEPRIVED PETITIONERS OF DUE PROCESS.

California requires that litigation challenging agency decisions on private development projects be filed within ninety days of the decision. *California Government Code* §65907 (use permits), §66499.37 (subdivisions). Petitioners missed this deadline, so they alleged other theories, such as inverse condemnation. However, these other claims all arise from the City's approval of the Project with its access configured a certain way Petitioners find offensive.

Petitioners then argue that the statute of limitations is unconstitutionally short. This argument is incorrect. Limitations periods need only be "reasonable" to be constitutional, *e.g., Kupka v. Board of Administration*, 122 Cal.App.3d 791, 797, 176 Cal.Rptr. 214, 218 (1981); *Bunker v. National Gypsum Co.*, 441 N.E.2d 8, 12 (Ind. 1982), appeal dismissed 460 U.S. 1076, 103 S.Ct. 1761, 76 L.Ed.2d 338, or "not be so manifestly inequitable as to amount to a denial of justice," *Ocean Shore Railroad Co. v. City of Santa Cruz*, 198 Cal.App.2d 267, 273, 17 Cal.Rptr. 892, 895 (1961).

There is a sound basis for the 90-day limitations period at issue here. As California courts have noted (typically in turning back challenges by developers), a short statute of limitations to challenge decisions on development projects helps reduce housing costs and avoid the construction of improvements inconsistent with other uses of the land. *E.g., Griffis v. County of Mono*, 163 Cal.App.3d 414, 422, 209 Cal.Rptr. 519, 524 (1985). Other

states allow even shorter periods when there is sufficient reason. *E.g., State ex rel. Labedz v. Beermann*, 229 Neb. 657, 667, 428 N.W.2d 608, 615 (1988) (upholding 10-day period to challenge refusal to file initiative petition). California's interests in the 90-day limitations period make the period eminently reasonable and thus constitutional.

Petitioners claim that the City should have given them notice of the limitations period. Due process does not generally require notice of the running of a limitations period. *Texaco, Inc. v. Short*, 454 U.S. 516, 535-536, 102 S.Ct. 781, 795-796, 70 L.Ed.2d 738, 755 (1982). Indeed, Petitioners' notion that notice was required arises from their fanciful belief that the City had something like a fiduciary obligation to advise Petitioners how best to sue it. (P.A. I: 76-77, ¶130-¶133)

Petitioners cite *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), as support. However, *Tulsa Professional* concerned a so-called "nonclaim" provision of judicial probate proceedings, where "the legal proceedings themselves trigger the time bar." *Tulsa Professional, supra*, 485 U.S. at 487, 108 S.Ct. at 1346, 99 L.Ed.2d at 577. The statutes here are deadlines to *file* judicial action and are thus true statutes of limitations. The *Tulsa Professional* opinion itself explained that due process was not implicated where "the State's involvement [is] in the mere running of a general statute of limitations." *Tulsa Professional, supra*, 485 U.S. at 485-486, 108 S.Ct. at 1345, 99 L.Ed.2d at 575. *Tulsa Professional* is inapplicable.

Petitioners claim they were deprived of a "pre-deprivation" proceeding. (Pet. 12) This is simply not true. One

purpose of a City Council hearing on the development project, as shown by the requirement of public notice, is to provide such a hearing. *Horn v. County of Ventura*, 24 Cal.3d 605, 612-619, 156 Cal.Rptr. 718, 721-726, 596 P.2d 1134, 1137-1142 (1979). Petitioners have alleged that the hearing was held. They appeared at the City Council hearing and opposed relocation of access to the Project. (P.A. I: 18, ¶84) Making the City's hearing on a development project meet the same standards as a judicial hearing would be inappropriate. The two are inherently different.

Petitioners claim that the statute requiring notice to neighbors of the hearing on the tentative map was "repealed." (Pet. 4) In fact, the requirement of notice of the hearing on the tentative map was merely moved into different statutes. *California Government Code* §66451.3, §65090, §65091. Petitioners' argument on this issue is rather odd, as Petitioner Thomas Mass did appear at the City's hearings.

IV

PETITIONERS' OTHER CLAIMS DO NOT IMPLICATE FEDERAL ISSUES.

Many of Petitioners' claims are based on their confusion about California's procedures governing review of development projects. None of these procedures implicate federal issues.

Under California law, a developer wishing to subdivide property into five or more new lots must first obtain approval for a "tentative map." *California Government*

Code §66426. Approval is a discretionary decision by the agency, and the agency may approve the tentative subdivision map subject to conditions. *California Government Code* §66452.1, §66452.2, §66474. Once the developer has complied with the conditions of the tentative map, such as constructing or securing the cost of constructing roads, it may submit a "final map." *California Government Code* §66456, §66457, §66462. Agency approval of the final map is mandatory if it is consistent with the tentative map. *California Government Code* §66458, §66474.1. Approval of the final map allows recordation of the new lots. *California Government Code* §66464, §66466(c). The Project involved a subdivision and thus obtained a tentative subdivision map (P.A. I: 2, ¶5, ¶9) as well as two types of use permits (P.A. I: 2, ¶8).

Consistent with California law, the City approved the Project's tentative map (and, although not clear in the complaints, use permits) first. (P.A. I: 2, ¶9) This first decision, on January 8, 1991, was *the* important discretionary decision on the Project. Petitioners had ninety days thereafter to challenge the Project, but did not file suit until October 18, 1991 (P.A. II: 18), after the City had approved the Project's final map on September 3, 1991 (P.A. I: 2, ¶9).

Petitioners have tried valiantly to turn these procedures into a federal case, but they failed. Petitioners argued that the City's approval of the final map was discretionary. However, California law, which established the subdivision process, defines approval of the final map as ministerial so long as it conforms to the previously approved tentative map. *California Government Code* §66474.1; *Youngblood v. Board of Supervisors*, 22 Cal.3d 644,

653-657, 150 Cal.Rptr. 242, 247-249, 586 P.2d 556, 561-563 (1978). The discretionary decision whether to allow the creation of the new lots is done at the tentative map stage.

Petitioners have claimed that the term "tentative" map is so misleading that the City's failure to explain its legal effect was a form of fraudulent concealment. (P.A. I: 76, ¶128) However, "tentative map" is a defined term of art from a statute, which case law has long interpreted as the crucial discretionary decision. Petitioners' familiarity with the statutory scheme is their own responsibility.

Petitioners claim they were denied due process because they were not notified of the City Council's consideration of the final map. However, because approval of a final map is mandatory and objective, it does not merit notice to neighbors. California has defined its own subdivision procedure such that approval of a final map is ministerial and based on objective criteria. Petitioners' claim that approval of a final map is discretionary is not a federal issue; it is one of local procedure (on which Petitioners are wrong).

Petitioners claim that approval of the Project violated both a statute reserving to the State authority over traffic regulations and the City's General Plan. (Pet. 12) These claims relate only to compliance with State law and thus raise no federal issue. Neither claim is true. The first claim, for example, misreads the State preemption statute (*California Vehicle Code* §21); California expressly delegated to local agencies the power to regulate the design of subdivisions, including the design of its streets. *California Government Code* §66411, §66418.

Petitioners had alluded to civil rights previously (e.g., P.A. I: 55, ¶75), but failed to state an explicit cause of action for deprivation until their amended and supplemental complaint (P.A. I: 65). However, this complaint was filed without leave of court, as required. (Pet. 34) American judicial systems typically require leave of court to file an amended complaint once a responsive pleading has been served. *E.g., In re Marriage of Peoples*, 96 Ill.App.3d 94, 96, 420 N.E.2d 1072, 1074 (1981); *F.R.Civ.P.* Rule 15(a). The complaints were based on essentially the same facts. Since there was no basis for liability and Petitioners had already had ample opportunities to amend, there was no reason to allow yet another complaint to be filed. *E.g., Mitchell v. Franchise Tax Board*, 183 Cal.App.3d 1133, 1137, 228 Cal.Rptr. 750, 753 (1986).

Petitioners argue that the same attorneys cannot represent both Respondents. (Pet. 6) This is incorrect. Fieldstone and the City have an "identical" interest in defeating Petitioners' claims. *Topanga Association for a Scenic Community v. County of Los Angeles*, 214 Cal.App.3d 1348, 1364, 263 Cal.Rptr. 214, 223 (1989). Moreover, Petitioners never alleged how this joint representation harmed them or became a federal issue.

Petitioners contend that the Project and its access will be a nuisance. However, nuisance is a matter of state, not federal, law. Although theoretically possible, this case does not present a nuisance reaching across a State line. For this Court to decide what constitutes a nuisance would unnecessarily entangle it in a topic not requiring national uniformity.

In any event, Petitioners also alleged that this development is taking place with the City's "full authorization, direction and approval," pursuant to permits authorized by local ordinances. (P.A. I: 10-11, ¶46) "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." *California Civil Code* §3482. This protection extends to private projects undertaken pursuant to permits. *Wheeler, supra,* 90 Cal.App.2d at 370, 203 P.2d at 51. Petitioners argue (Pet. 7) that this statute cannot protect a private entity. Their argument would mean that developers could be required by a city, acting under its police powers, to build a project in a certain way – and then be held liable for having done what they were ordered to do. *This* would raise a due process issue, but fortunately it is not the law.

The Petition argues that the immunity from nuisance liability is "a void defense against a claim for 'just compensation' under the constitution." (Pet. 7) Petitioners have confused two separate doctrines. A taking without compensation is of constitutional magnitude; a nuisance is not. The law bars the taking (inverse condemnation) claim for other reasons; that an immunity bars a nuisance claim raises no federal issue.

This action does raise questions relating to how far neighbors can be allowed to go to hinder approved development projects. However, those issues are hardly unsettled, and there is no need for this Court to become involved.

CONCLUSION

There is no reason to grant review. Case law in this area is settled, uniform, logical, and against Petitioners. Respondents respectfully request that this Court deny certiorari.

DATED: December 28, 1994

Respectfully submitted,

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No. 94-1018

In The

Supreme Court of the United States

October Term, 1994

THOMAS A. MASS, pro se, and JANET A. MASS,

Petitioners,

v.

CITY OF CARLSBAD, a Municipal Corporation, and FIELDSTONE/LA COSTA ASSOCIATES LIMITED PARTNERSHIP, a California Limited Partnership,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Fourth Appellate District, Division One

RESPONDENTS' APPENDIX

(Statutes)

U.S. Constitutional Provisions:

Fifth Amendment:

The text of this provision appears in Petitioners' Appendix, Volume II, page 1.

Federal Rules of Civil Procedure:

Rule 15: Amended and Supplemental Pleadings

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise directs.

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after

judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) Relation Back of Amendments. An Amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper

party, the action would have been brought against the party.

The delivery or mailing of process to the United States Attorney, or United State Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

California Statutes:

Civil Code §3482:

The text of this provision appears in Petitioners' Appendix, Volume II, page 12.

Government Code §818.4: Issuance, denial, suspension or revocation of permit, license, etc.

A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

Government Code §65090: Public notice for plans

(a) When a provision of this title requires notice of a public hearing to be given pursuant to this section, notice shall be published pursuant to Section 6061 in at least one newspaper of general circulation within the jurisdiction of the local agency which is conducting the proceeding at least 10 days prior to the hearing, or if there is no such newspaper of general circulation, the notice shall be posted at least 10 days prior to the hearing in at least three public places within the jurisdiction of the local agency.

(b) The notice shall include the information specified in Section 65094.

(c) In addition to the notice required by this section, a local agency may give notice of the hearing in any other manner it deems necessary or desirable.

Government Code §65091:

The text of this provision appears in Petitioners' Appendix, Volume II, page 6.

Government Code §65907: Limitation of actions attacking certain decisions; application of section to charter cities

(a) Except as otherwise provided by ordinance, any action or proceeding to attack, review, set aside, void, or annul any decision of matters listed in Sections 65901 and 65903, or concerning any of the proceedings, acts, or determinations taken, done, or made prior to such decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, shall not be maintained by any person unless the action or proceeding is commenced within 90 days and the legislative body is served within 120 days after the date of the decision. Thereafter, all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of that decision or of these proceedings, acts, or determinations. All actions brought pursuant to this section shall be given preference over all other civil matters before the court, except probate, eminent domain, and forcible entry and unlawful detainer proceedings.

(b) Notwithstanding Section 65803, this section shall apply to charter cities.

(c) The amendments to subdivision (a) shall apply to decisions made pursuant to this division on or after January 1, 1984.

Government Code §66411: Local control of common interest developments and subdivision design and improvement; short term leases

Regulation and control of the design and improvement of subdivisions are vested in the legislative bodies of local agencies. Each local agency shall, by ordinance, regulate and control the initial design and improvement of common interest developments as defined in Section 1351 of the Civil Code and subdivisions for which this division requires a tentative and final or parcel map. In the development, adoption, revision, and application of such ordinance, the local agency shall comply with the provisions of Section 65913.2. The ordinance shall specifically provide for proper grading and erosion control, including the prevention of sedimentation or damage to offsite property. Each local agency may by ordinance regulate and control other subdivisions, provided that the regulations are not more restrictive than the regulations for those subdivisions for which a tentative and final or parcel map are required by this division, and provided further that the regulations shall not be applied to short-term leases (terminable by either party on not more than 30 days' notice in writing) of a portion of the operating right-of-way of a railroad corporation as defined by Section 230 of the Public Utilities Code unless a showing is made in individual cases, under substantial evidence, that public policy necessitates the application of the regulations to those short-term leases in individual cases.

Government Code §66418: Design

"Design" means: (1) street alignments, grades and widths; (2) drainage and sanitary facilities and utilities, including alignments and grades thereof; (3) location and size of all required easements and rights-of-way; (4) fire roads and firebreaks; (5) lot size and configuration; (6) traffic access; (7) grading; (8) land to be dedicated for park or recreational purposes; and (9) such other specific physical requirements in the plan and configuration of the entire subdivision as may be necessary to ensure consistency with, or implementation of, the general plan or any applicable specific plan.

Government Code §66426: Necessity of tentative and final maps

A tentative and final map shall be required for all subdivisions creating five or more parcels, five or more condominiums as defined in Section 783 of the Civil Code, a community apartment project containing five or more parcels, or for the conversion of a dwelling to a stock cooperative containing five or more dwelling units, except where:

(a) The land before division contains less than five acres, each parcel created by the division abuts upon a maintained public street or highway and no dedications or improvements are required by the legislative body, or

(b) Each parcel created by the division has a gross area of 20 acres or more and has an approved access to a maintained public street or highway, or

(c) The land consists of a parcel or parcels of land having approved access to a public street or highway which comprises part of a tract of land zoned for industrial or commercial development, and which has the approval of the governing body as to street alignments and widths, or

(d) Each parcel created by the division has a gross area of not less than 40 acres or is not less than a quarter of a quarter section.

A parcel map shall be required for those subdivisions described in subdivisions (a), (b), (c), and (d).

Government Code §66451.3: Notice of hearing; expenses

(a) Unless otherwise provided by this division, notice of a hearing held pursuant to this division shall be given pursuant to Sections 65090 and 65091.

(b) If the proposed subdivision is a conversion of residential real property to a condominium project, community apartment project, or stock cooperative project, the notice shall also be given by the local agency by United States mail to each tenant of the subject property, and shall also include notification of the tenant's right to appear and be heard. The requirements of this subdivision may be satisfied by service of the notice in compliance with the requirements for service of legal process by mail.

(c) Pursuant to Section 66451.2, fees may be collected from the subdivider for expenses incurred under this section.

(d) Any interested person may appear at the hearing and shall be heard.

Government Code §66452.1: Time for action by advisory agency

(a) If the advisory agency is not authorized by local ordinance to approve, conditionally approve or disapprove the tentative map, it shall make its written report on the tentative map to the legislative body within 50 days after the filing thereof with its clerk.

(b) If the advisory agency is authorized by local ordinance to approve, conditionally approve, or disapprove the tentative map, it shall take that action within 50 days after the filing thereof with its clerk and report its action to the subdivider.

(c) The local agency shall comply with the time periods referred to in Section 21151.5 of the Public Resources Code. The time periods specified in subdivisions (a) and (b) shall commence after certification of the environmental impact report, adoption of a negative declaration, or a determination by the local agency that the project is exempt from the requirements of Division 13 (commencing with Section 21000) of the Public Resources Code.

Government Code §66452.2: Consideration of map by legislative body; time

(a) If there is an advisory agency which is not authorized by local ordinance to approve, conditionally approve or disapprove the tentative map, at the next regular meeting of the

legislative body, following the filing of the advisory agency's report with it, the legislative body shall fix the meeting date at which the tentative map will be considered by it, which date shall be within 30 days thereafter and the legislative body shall approve, conditionally approve, or disapprove the tentative map within that 30-day period.

(b) If there is no advisory agency, the clerk of the legislative body shall submit the tentative map to the legislative body at its next regular meeting which shall approve, conditionally approve or disapprove that map within 50 days thereafter.

(c) The local agency shall comply with the time periods referred to in Section 21151.5 of the Public Resources Code. The time periods specified in subdivisions (a) and (b) shall commence after certification of the environmental impact report, adoption of a negative declaration, or a determination by the local agency that the project is exempt from the requirements of Division 13 (commencing with Section 21000) of the Public Resources Code.

Government Code §66456: Survey; preparation of final map

After the approval or conditional approval of the tentative map and prior to the expiration of such map, the subdivider may cause the real property included within the map, or any part thereof, to be surveyed and a final map thereof prepared in accordance with the approved or conditionally approved tentative map.

Government Code §66457: Filing for approval

(a) A final map or parcel map conforming to the approved or conditionally approved tentative map, if any, may be filed with the legislative body for approval after all required certificates or statements on the map have been signed and, where necessary, acknowledged.

(b) If the subdivision lies entirely within the territory of a city, the map shall be filed with the city. If the subdivision lies entirely within unincorporated territory, the map shall be filed with the county. If the subdivision lies partially within two or more territories, the map shall be filed with each, and each shall act thereon as provided in this chapter.

Government Code §66458:

The text of this provision appears in Petitioners' Appendix, Volume II, page 8.

Government Code §66462: Agreements relating to improvements not completed

(a) If, at the time of approval of the final map by the legislative body, any public improvements required by the local agency pursuant to this division or local ordinance have not been completed and accepted in accordance with standards established by the local agency by ordinance applicable at the time of the approval or conditional approval of the tentative map, the legislative body, as a condition precedent to the approval of the final map, shall require the subdivider to enter into one of the

following agreements specified by the local agency:

(1) An agreement with the local agency upon mutually agreeable terms to thereafter complete the improvements at the subdivider's expense.

(2) An agreement with the local agency to thereafter do either of the following:

(A) Initiate and consummate proceedings under an appropriate special assessment act or the Mello-Roos Community Facilities Act of 1982, Chapter 2.5 (commencing with Section 53311) of Part 1 of Division 2 of Title 5 for the financing and completion of all of the improvements.

(B) If the improvements are not completed under a special assessment act or the Mello-Roos Community Facilities Act of 1982, Chapter 2.5 (commencing with Section 53311) of Part 1 of the Division 2 of Title 5, to complete the improvements at the subdivider's expense.

(b) The standards may be adopted by reference, without posting or publishing them, if they have been printed in book or booklet form and three copies of the books or booklets have been filed for use and examination by the public in the office of the clerk of the legislative body.

(c) The local agency entering into any agreement pursuant to this section shall require that performance of the agreement be guaranteed by the security specified in Chapter 5 (commencing with Section 66499).

Government Code §66464: Transmittal of maps; certification or statement concerning certificates, statements and deposits

(a) Unless otherwise provided by the county, if the final map or map parcel is not subject to Section 66493, after the approval by the city of a final map of a subdivision or a parcel map, the city clerk shall transmit the map to the county recorder.

(b) If a final map or parcel map is subject to Section 66493, after all certificates or statements and security required under Section 66493 have been filed and deposited with the clerk of the board of supervisors and approved by the county, the clerk of the board of supervisors shall certify or state that the certificates and statements have been filed and deposits have been made and shall transmit the final map or parcel map to the county recorder.

(c) After the approval by the county of a final or parcel map of a subdivision within unincorporated territory, the map shall be transmitted ultimately to the county recorder.

Government Code §66466: Acceptance or rejection by county recorder; fee; storage; index

(a) The county recorder shall have not more than 10 days within which to examine a final or parcel map and either accept or reject it for filing.

(b) If the county recorder rejects a final or parcel map for filing, the county recorder shall, within 10 days thereafter, mail notice to the subdivider and the city engineer if the map is

within a city, or the county surveyor if the map is within the unincorporated area, that the map has been rejected for filing, giving the reasons therefor, and that the map is being returned to the city clerk if the map is within a city, or to the clerk of the board if the map is within the unincorporated area, for action by the legislative body. Upon receipt of the map, the clerk shall place the map on the agenda of the next regular meeting of the legislative body and the legislative body shall, within 15 days thereafter, rescind its approval of the map and return the map to the subdivider unless the subdivider presents evidence that the basis for the rejection by the county recorder has been removed. The subdivider may consent to a continuance of the matter; however, the prior approval of the legislative body shall be deemed rescinded during any period of continuance. If a map is returned to the county recorder, the county recorder shall have a new 10-day period to examine the map and either accept or reject it for filing.

(c) If the county recorder accepts the map for filing, the acceptance shall be certified on the face thereof. The map shall be securely fastened in a book of subdivision maps, in a book of parcel maps, or in a book of cities and towns which shall be kept for that purpose, or in any other manner as will assure that the maps will be kept together. The map shall become a part of the official records of the county recorder upon its acceptance by the county recorder for filing.

(d) The fee for filing and indexing the map is as prescribed in Section 27372 of the Government Code.

(e) The original map shall be stored for safekeeping in a reproducible condition. The county recorder may maintain for public reference a set of counter maps that are prints of the original maps and produce the original maps for comparison upon demand.

(f) Upon the filing of any map, including amended maps and certificates of correction for recordation pursuant to this section or any record of survey pursuant to the Professional Land Surveyors' Act (Chapter 15 (commencing with Section 8700) of Division 3 of the Business and Professions Code), the surveyor or engineer who prepared the document shall transmit a copy of the document, including all recording information, to the county surveyor, who shall maintain an index, by geographic location, of the documents. The county surveyor may charge a fee not to exceed the fee charged for recording the document, for purposes of financing the costs of maintaining the index of the documents.

The requirements of this subdivision shall not apply to any county which requires a document filed pursuant to this section to be transmitted to the county surveyor and requires that official to maintain an index of those documents.

Government Code §66474:

The text of this provision appears in Petitioners' Appendix, Volume II, pages 9-10.

Government Code §66474.1:

The text of this provision appears in Petitioners' Appendix, Volume II, page 10.

Government Code §66499.37:

The text of this provision appears in Petitioners' Appendix, Volume II, page 11.

Vehicle Code §21:

The text of this provision appears in Petitioners' Appendix, Volume II, page 11.
